89-5 27

NO. _____

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1989

LAWRENCE KINCHELOE,

Petitioner,

vs.

MICHAEL ROBTOY,

Respondent.

KENNETH DUCHARME,

Petitioner,

vs.

NEDLEY G. NORMAN, JR.,

Respondent.

CONSOLIDATED PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

I. Does the Ninth Circuit Court of Appeals have authority under federal habeas corpus jurisdiction to retroactively apply a "state created right" when the Washington Supreme Court refused to do so?

II. Should Robtoy and Norman have their sentences reduced from life without parole to life with a possibility of parole when they already received relief under United States v. Jackson by virtue of State v. Frampton and a statutory savings clause?

III. Did the Ninth Circuit Court of Appeals reach an incorrect decision when it ignored this Court's opinion in Corbitt v. New Jersey, a precedent which applies to this case and compels a different result?

LIST OF PARTIES

The parties to the proceedings below were: Petitioners, Lawrence Kincheloe, former Superintendent, Washington State Penitentiary, now Director of Division of Prisons of the Washington State Department of Corrections; Kenneth DuCharme, Superintendent, Washington State Reformatory. The above parties were aligned as Respondents below.

Respondents: Michael Robtoy and Nedley G. Norman, Jr., inmates serving sentences in the Washington State prison system, were aligned as Petitioners below.

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CONSOLIDATED PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners respectfully pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Ninth Circuit, filed March 31, 1989, rehearing denied on June 26, 1989.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit decision in Robtoy v. Kincheloe, is reported at 871 F.2d 1478 (1989). It is reprinted hereto in Appendix A. The United States Court of Appeals for the Ninth Circuit decision in Norman v. DuCharme, is reported at 871 F.2d 1473 (1989). It is reprinted hereto in Appendix B.

The United States District Court's decisions in Robtoy v. Kincheloe and Norman v. DuCharme have not been reported. The Reports and Recommendations and Orders Denying Writ of Habeas Corpus in each case are reprinted hereto as Appendix C and D, respectively.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its opinions in Robtoy v. Kincheloe and Norman v. DuCharme, on March 31, 1989, reversing and remanding the district courts' denial of the petitions for writ of habeas corpus as to the sentencing issue.[1] Respondents' timely Petitions for Partial Rehearing were denied by the Court of Appeals by order filed June 26, 1989.

Petitioners invoke this Court's jurisdiction to review the opinion of the Ninth Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved and their pertinent text is set forth in Appendix E.

Fifth Amendment to the United States Constitution.

Sixth Amendment to the United States Constitution.

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1. The district courts' decision upholding Respondents' convictions, were affirmed by the Ninth Circuit Court of Appeals and are not at issue in this Petition.

Fourteenth Amendment to the United States Constitution, section 1.

28 U.S.C § 2254(a).

Washington Revised Code § 9A.32.030(1)(a) (1975).

Washington Revised Code § 9A.32.040(1), (2), (3) (1977).

Washington Revised Code § 9A.32.047 (1977).

Washington Revised Code § 9A.32.900 (1975-76).

Washington Revised Code § 10.94.010 (1977).

Washington Revised Code §10.94.020 (1977).

Washington Revised Code §10.94.030(2), (6) (1977).

Washington Revised Code §10.94.900 (1977).

STATEMENT OF THE CASE

Respondents, Nedley G. Norman, Jr. and Michael Robtoy are convicted murderers currently incarcerated within the Washington State Department of Corrections.

A. TRIAL COURT PROCEEDINGS

Respondent Norman was arrested and charged with First Degree Murder on April 20, 1978. He pleaded not guilty at the arraignment on the same day. A Notice of Intent to Seek Death Penalty and an Amended Information were filed on May 25, 1978, setting out the aggravating circumstances sufficient to subject Mr. Norman to the possibility of the death penalty. He was convicted by jury trial and sentenced to death on October 4, 1978, pursuant to former Wash. Rev. Code §10.94.020.[2]

Respondent Robtoy was arrested on February 5, 1979, and charged with First Degree Murder on February 9, 1979. A plea of not guilty was entered on his behalf because Mr. Robtoy refused to enter a plea. A Notice of Intent to Seek the Death Penalty was filed on February 25, 1979, setting out the aggravating circumstances sufficient to subject Mr. Robtoy to the possibility of the death penalty. He was convicted by a jury trial and sentenced to death pursuant to Wash. Rev. Code §10.94.020 on June 4, 1979.

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2. All citations to Revised Code of Washington refer to the version of the statute in effect at the time Respondents were charged, tried and convicted. Pertinent sections are set out in full in Appendix E.

Both respondents appealed their convictions to the Washington Supreme Court. Their appeals were consolidated with cases involving other persons challenging Washington death penalty statutes. State v. Frampton, 95 Wash. 2d 469, 627 P.2d 922 (1981).

B. STATE V. MARTIN

At the time both respondents were charged, tried and convicted, Washington law did not allow persons charged with first degree murder to avoid the death penalty by pleading guilty. While their appeals were pending, the Washington Supreme Court interpreted Washington law to allow a defendant charged with first degree murder to plead guilty, in which case the maximum sentence would be life with the possibility of parole. State v. Martin, 94 Wash. 2d 1, 614 P.2d 164 (1980).

In Martin, the defendant attempted to plead guilty to the charge of First Degree Murder and avoid the possibility of the imposition of the death sentence resulting from a jury trial. Martin, 94 Wash. 2d at 3. The trial court refused to accept the guilty plea on the sole ground that the state had the right to request the death penalty, thus preventing the defendant's admission of guilt. Id. Defendant then refused to make a plea to the charge. Id. Subsequent to the arraignment proceeding, the state filed an Amended Information and a Notice of Intent to Request the Death Penalty. Id.

The Washington Supreme Court determined that the defendant had a right to plead guilty to First Degree Murder and that if he did plead guilty, no special sentencing jury could be impaneled to consider the issue of the imposition of the death penalty. See, State v. Martin, supra. Its holding was based on the application of a state criminal court rule[3] that provided for three different types of pleas: (1) not guilty; (2) not guilty by reason of insanity; and (3) guilty. Martin, 94 Wash. 2d at 4-6. The Court finally determined that the maximum penalty that the defendant could receive upon the plea of guilty was life with the possibility of parole. Martin, 94 Wash. 2d at 6-9.

C. DIRECT APPEAL

Several months after its Martin decision, the Washington Supreme Court issued its decision in the consolidated appeals of

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3. Washington CrR 4.2.

Respondents' death sentences. State v. Frampton, 95 Wash. 2d 469, 627 P.2d 922 (1981). Relying on the decision in United States v. Jackson, 390 U.S. 570 (1968), the Washington Supreme Court held that "where, pursuant to statutory procedure, the death penalty is imposed upon conviction following a plea of not guilty in a trial, but is not imposed when there is a plea of guilty, that statute is unconstitutional." Frampton, 95 Wash. 2d at 478.[4]

Once the majority in Frampton held the death penalty unconstitutional, the court then considered the appropriate sentence to be imposed. Five of nine Justices wrote opinions on this issue. Justice Dimmick, now a United States District Court Judge, wrote the controlling concurrence, on the issue of the appropriate sentence -- life without parole. Frampton, 95 Wash. 2d at 528.[5]

Justice Dimmick wrote that the severability provision, Wash. Rev. Code §10.94.900, indicated that the savings provision of Wash. Rev. Code §9A.32.047 could stand alone although other parts of the statute were held invalid. Frampton ,95 Wash. 2d at 528-529. Therefore, the majority determined that the appropriate sentence was life without parole for all individuals who had their death sentences overturned pursuant to State v. Frampton. Id.

Subsequently, Respondent Robtoy sought additional relief from the state courts, arguing that State v. Martin, supra, should be applied retroactively so as to allow him to change his plea to guilty and receive a maximum sentence of life with the possibility of parole. The Washington Supreme Court held that

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4. Following the Washington Supreme Court decision in Frampton, the Washington legislature enacted a new death penalty statute to cure the defects announced by the Frampton court. See, Ch. 138, Washington Laws of 1981, codified in Washington Revised Code 10.95. The constitutionality of this statute has been upheld by both state and federal courts. See, State v. Campbell,103 Wash. 2d 1, (1984), cert. denied, 105 S.Ct. 2169 (1985), 112 Wash. 2d 186 (1989) and Campbell v. Kincheloe, 829 F.2d 1453 (9th Cir. 1987), cert. denied, 109 S.Ct. 380 (1988).

5. Justice Dimmick's opinion on this issue is set out in Frampton, at 528-30. Justices Hicks, Brachtenbach, and Rosellini signed Justice Dimmick's opinion. Frampton, at 530. Justice Stafford concurred with Justice Dimmick's opinion in his concurring in part, dissenting in part opinion. Frampton, at 513. A sixth justice, Justice Dore, would have upheld the death penaltystatute in its entirety, and thus presumably also agreed with Justice Dimmick's conclusion as to the savings clause, although his opinion does not specifically address this issue. See, Frampton, at 519-528.

those within the class such as the Respondents were unlike the situation in State v. Martin, and therefore, the court was unwilling to allow Respondent Robtoy to withdraw his not guilty plea and enter a plea of guilty to First Degree Murder. State v. Robtoy, 98 Wash. 2d 30, 45, 653 P.2d 284 (1982). The court in essence refused to apply the Martin decision retroactively.

D. FEDERAL DISTRICT COURT

Unsuccessful in the state court, Respondents petitioned the United States District Courts for writs of habeas corpus, pursuant to 28 U.S.C.§ 2254, challenging both their convictions and their sentences of life without parole. The United States District Courts entered orders denying both petitions on all issues. See, Appendices C and D. A timely appeal was filed by both Respondents with the United States Court of Appeals for the Ninth Circuit.

E. COURT OF APPEALS, NINTH CIRCUIT

The Court of Appeals affirmed the convictions of the Respondents, but reversed their sentences of life without parole, holding that, under Washington law, Respondents Robtoy and Norman could not have received a sentence of life without parole if they had pleaded guilty. [6] The Court of Appeals relied on United States v. Jackson, 390 U.S. 570 (1968), holding that Respondents' sentences were unconstitutional in that their assertion of the right to jury trial was "penalized" because they received an arguably higher sentences- -life without parole-- than life with the possibility of parole, the maximum sentence for one who pleaded guilty after the decision in State v. Martin. Robtoy v. Kincheloe, 871 F.2d 1478, 1481 (9th Cir. 1989).

In addition, the Court of Appeals determined that Mr. Robtoy and Mr. Norman had standing to contest their sentences under Jackson even though they had in fact exercised their right to a jury trial because Jackson applied to "statutes that penalized the right to jury trial, as well as to statutes that chill that right." Robtoy, 871 F.2d at 1481.

Finally, the Court of Appeals held that Jackson was not limited to death penalty cases and that the difference of sentences

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6. The Court of Appeals thereby in effect gave the decision in State v. Martin a retroactive effect. Where the Washington Supreme Court refused to apply the Martin decision, which interpreted Washington law, to Respondents, the Court of Appeals has created a federal right to have the Martin decision applied retroactively.

of life with and life without possibility of parole is significant enough to warrant additional relief under Jackson. Robtoy, 871 F.2d at 1481.

It is this portion of the Court of Appeals decision that Petitioners respectfully request that this Court review.

REASONS FOR GRANTING THE WRIT

I. BY RETROACTIVELY APPLYING STATE V. MARTIN WHEN THE WASHINGTON SUPREME COURT REFUSED TO DO SO, THE NINTH CIRCUIT DECISIONS BELOW FRUSTRATE THE ABILITIES OF THE STATES TO ADJUST THEIR CRIMINAL JUSTICE SYSTEMS TO THE NEEDS OF A CHANGING SOCIETY AND UNDERMINE PUBLIC CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM.

Justice O'Connor has written of the "special costs" which the expansive use of the federal habeas writ imposes on the concept of federalism:

> The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusion into state criminal trials frustrate the State's sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.

Engle v. Isaac, 456 U.S. 107, 129 (1982). The Ninth Circuit's decision in these cases is the type of unwarranted federal intrusion into the states' realm against which Justice O'Connor cautioned.

Respondents have been convicted of serious offenses.[7] More than ten years have passed since the commission of the crimes. They were tried and convicted under a legislatively scheme - enacted by an overwhelming vote on a public initiative - establishing a severe penalty for the heinous kinds of crimes they committed.

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7. Mr. Norman was convicted of the cold-blooded murder of a Kitsap County, Washington sheriff's deputy. The deputy had stopped Mr. Norman and two co-defendants while they were towing a vehicle they had stolen. Without provocation, Mr. Norman gunned down the deputy, shooting him at point-blank range, killing him instantly. See Appendix C, Page C2-3. Mr. Robtoy was convicted of strangling a man with whom he had engaged in sexual relations, after the victim suggested that Robtoy, overdue on a furlough from the states prison system, should turn himself in. Mr. Robtoy was also implicated in the strangulation death of a woman with whom he had also had sex, but was apparently never charged with that crime. State v. Robtoy, at 32-34.

In fact, the death sentence was originally ordered as to both Respondents. However, upon review by the Washington Supreme Court, the death penalty statute was invalidated under United States v. Jackson, supra. See, State v. Frampton, supra. Respondents now seek yet additional relief from the penalty that the state of Washington has imposed for their crimes.[8]

Both Respondents were convicted in state court of state criminal law violations. The state supreme court decision overturning their death sentences had its roots in the Martin decision, which was based upon state law. The Washington Supreme Court specifically refused to apply its Martin decision retroactively. The Ninth Circuit decisions below needlessly interject the federal judiciary into the realm of a state's criminal judicial system by, in effect, creating a federal right to have the Martin decision, apply retroactively.

State courts and legislative bodies must have the flexibility to adjust their criminal laws to the evolving needs of a changing society. The decision as to whether a state court decision based on state law should be applied retroactively is a state, not federal, question, and must, therefore, be left to the state without undue interference by the federal judiciary.

While the number of convicted murders directly affected by the decisions below may be small,[9] the implications of these decisions are more widespread. Many states have made changes in their death penalty statutes over the past several years, and many death penalties have been set aside. Does each person whose sentence has been reduced as have the Respondents thus also stand to benefit from subsequent state law decisions, even

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8. Respondents are currently serving sentences of life without parole and are now seeking to have those sentences reduced to the penalty of life with the possibility of parole.

9. There were a total of five persons (including Respondents) whose death sentences were set aside by the Frampton decision, and who are now serving sentences of life without parole. There is another group of offenders -- 11 in number -- convicted under the same statute as Respondents either before or after Framptonand sentenced to life without parole. This latter group could argue that they are entitled to be resentenced under the decisions below as well. In fact, one member of the group has challenged his sentence, and a United States District Court Magistrate has recommended that the decisions below apply and the sentence should be changed to life with the possibility of parole. Marzano v. Kincheloe, C88-232TB, (W.D. Wash).

though the state courts decline to make them retroactive? If allowed to stand, the decisions below support such a proposition. Thus, any new but nonretroactively applied interpretation of a state's criminal law arguably creates a new class of beneficiaries like the Respondents.

Finally, the decisions below undercut public confidence in the criminal justice system. Respondents, who have successfully avoided the death penalty by virtue of a judicial decision, continue to seek additional relief more than a decade after their crimes were committed and they were tried and convicted. In granting them additional relief, the Ninth Circuit has reinforced the popularly held perception that punishment under our criminal justice system is no longer swift nor certain.

II. ROBTOY AND NORMAN ARE NOT CONSTITUTIONALLY ENTITLED TO DOUBLE RELIEF UNDER UNITED STATES V. JACKSON.

The Ninth Circuit Court of Appeals' determination that the current life without parole sentences of Respondents Robtoy and Norman were unconstitutional under United States v. Jackson, 390 U.S. 570 (1968), presents an issue that jeopardizes the appropriate application of the Jackson decision in other federal and state courts. Supreme Court Rule 17.1(a). The Court of Appeals has misinterpreted and expanded the language in holding that the life without parole sentences are unconstitutional in the Respondents' case.

A. The Court of Appeals Misinterpreted the Decision in Jackson By Separating the Concept of the Chilling Effect on a Defendant's Right to Plead Not Guilty and to Demand a Jury Trial From the "Penalty" Which Gives Rise to that Chilling Effect.

In Jackson, this Court invalidated the punishment of death under the Federal Kidnapping Act, while maintaining the validity of the remainder of the statute. Jackson, at 572. The Federal Kidnapping Act allowed for the punishment by death of anyone who knowingly and unlawfully transported any person interstate, held such person for ransom and thereafter had not liberated unharmed the kidnapped person, but only upon the recommendation of the verdict of the jury. Jackson, at 570-571. This Court determined that it was impermissible to create a

penalty without setting out a procedure for imposing the death penalty upon a defendant who either waives the right to jury trial or pleads guilty. Jackson, at 576-581.

This Court held that "[t]he inevitable effect of any such provision, is to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." Jackson, at 581. As the Jackson court observed, "If the provision had no other purpose or effect than to chill the assertion of a constitutional right by penalizing those who chose to exercise them, then it would be patently unconstitutional." Jackson, at 581. "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary or excessive." Jackson, at 582.

Specifically, the Jackson court stated that "[t]he goal of limiting the death penalty to cases in which a jury recommends it is entirely legitimate one. But that goal can be achieved without penalizing those defendants who plead not guilty and demand jury trial." Jackson, at 582. While this Court recognized the power of the Congress to impose a death penalty for violation of the Federal Kidnapping Act, it specifically held that Congress could not impose such a penalty in a manner that needlessly discourages the assertion of a constitutional right. Jackson, at 583.

In deciding Jackson, this Court inextricably intertwined the principles of "chilling effect" and "penalization." No less than four times on pages 581-2 of its Jackson decision, this Court spoke of the chilling effect in terms of the penalty imposed on a defendant if he pleaded not guilty and demanded a jury trial. Jackson, at 581-582.

This Court in Jackson was concerned about the chilling effect on constitutional rights, specifically, the Fifth and Sixth Amendments. The Jackson court did not say that the relief afforded by that decision should be extended to those who - like Respondents - have in fact exercised their constitutional rights by pleading not guilty and demanding a jury trial.

The Ninth Circuit differentiated between two concerns: (1) chilling the exercise of the Petitioners' rights to trial, and (2) penalizing those defendants who, notwithstanding the chilling effect, plead not guilty and demand a jury trial. This Court has treated the two concepts as interrelated. Only those defendants

who are chilled by being penalized in the exercise of their constitutional rights would be entitled to relief under Jackson. Therefore, only where a penalty imposed in fact discourages a defendant from exercising his constitutional rights should Jackson apply.

B. The Court of Appeals Improperly Allowed the Respondents to Receive Double Relief Under the Decision in Jackson.

Second, the Court of Appeals erred by allowing the Respondents double relief under Jackson. The Jackson decision created only three categories of defendants who were affected: (1) defendants who plead guilty, (2) defendants who waive jury trial, and (3) defendants who plead not guilty, demand a jury trial, and face a potential death sentence. See, Robtoy, at 1481 (citing Parker v. United States, 400 F.2d 248 (9th Cir. 1968), cert. denied 393 U.S. 1097, and Sims v. Eyman, 405 F.2d 439 (9th Cir. 1969), judgment vacate in part on other grounds, 408 U.S. 934 (1972). The creation of these classifications is consistent with the application of the chilling concept from the Jackson decision. Only those individuals who were in fact chilled by the penalty from exercising the constitutional rights or who are currently facing the death penalty have the right to be reviewed under Jackson. Respondents were in the third class of individuals to whom Jackson applied when they received relief under Jackson. See, State v. Frampton, supra. The Ninth Circuit's decision below have created a fourth and impermissible category of individuals eligible for Jackson relief: those defendants who plead not guilty and demand a jury trial and thus enjoy the full benefits of the rights Jackson was designed to protect.

This extension of Jackson is outside the realm of what was intended by this Court and has wide-spread implications for other federal jurisdictions, as well as other state court systems.

The relief contemplated in Jackson was awarded Mr. Robtoy and Mr. Norman at the time they had their death sentences overturned by the Washington Supreme Court in State v. Frampton, supra. At the time of Respondents' arraignment, the only sentences they faced upon conviction were death or life without parole. To the extent that they may argue that the Martin decision gave them the chance at life with a possibility of parole, Respondents would be wrong. The Washington Supreme Court

specifically stated that the Martin situation was different from this. State v. Frampton, supra; State v. Robtoy, supra. To create yet another class of individuals to whom Jackson would apply, impermissibly gives Mr. Robtoy and Mr. Norman, as well as other potential petitioners and defendants, an unwarranted "double shot" at relief which was not contemplated in Jackson. This "double shot" was expressly rejected in State v. Frampton when the Washington Supreme Court upheld the savings provision in Wash. Rev. Code §9A.32.047, and should likewise be rejected by this Court.

III. THE NINTH CIRCUIT DECISIONS IN ROBTOY AND NORMAN COMPLETELY IGNORE THIS COURT'S OPINION IN CORBITT V. NEW JERSEY, WHICH COMPELS A DIFFERENT RESULT.

In Corbitt v. New Jersey, 439 U.S. 212 (1978), this Court addressed a sentencing scheme in which a defendant charged with murder faced two sentencing possibilities if he or she exercised the right to a jury trial:

> (1) If the jury designated the murder as first degree, then a mandatory punishment of life in prison was imposed; [10]
>
> (2) If the jury designated the murder as second degree, then a discretionary term of not more than thirty years was imposed.

Corbitt, at 214-215.

In contrast with these options, if the same defendant convinced the court to accept a plea of non vult or nolo contendre, then the trial judge had discretion to impose a sentence of either life imprisonment, or a term of not more than thirty years: there was no mandatory life sentence. The defendant in Corbitt exercised his right to plead not guilty, and the jury imposed a mandatory life sentence after convicting him of first degree murder. Id. at 215-216.

This Court affirmed Corbitt's mandatory life sentence, rejecting the argument that United States v. Jackson, 390 U.S. 570

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10 This mandatory life sentence was not part of the original statutory scheme: it resulted from invalidation of New Jersey's death penalty and invocation of a savings clause. Similarly, Robtoy's and Norman's sentences resulted from application of a savings clause, former RCW 9A.32.047; 10.94.900; State v. Frampton, supra.

(1968) was controlling precedent. This Court held that not every burden on the exercise of the right to jury trial is constitutionally impermissible under Jackson. Corbitt, at 218-219. Plea-bargaining arrangements may offer defendants incentives for pleading guilty as part of their decision-making process when they choose whether to go to trial. Potential leniency in the judge's discretion upon entry of a non vult or nolo contendre plea, compared to a potential mandatory life sentence upon entry of a not guilty plea, was held to be constitutionally permissible in Corbitt.

The distinction between life without parole and life with the possibility of parole under Washington law is analogous to the difference between the mandatory life sentence and judicial sentencing discretion in Corbitt. A life sentence with possibility of parole for first degree murder under Washington law carries with it a requirement that the offender serve at least 20 years of continuous and meritorious confinement before he or she may be considered for release on parole. Wash. Rev. Code 9.95.115; In re Mayner, 107 Wash. 2d 512, 730 P.2d 1321 (1986).[11] Even after the statutory requirements have been met, the inmate has no protected liberty interest in parole. In re Ayers, 105 Wn.2d 161, 162-164, 713 P.2d 88, 89 (1986); see also Mayner v. Callahan, 873 F.2d 1300, 1301 (9th Cir. 1989) (characterizing possibility of parole after 20 years as a "conditional privilege"). This degree of incentive to plead guilty -- the possibility of receiving a conditional privilege after twenty years of continuous and meritorious confinement -- is not a needless or arbitrary burden on the right to jury trial.

Under Washington law, a life sentence, with or without parole, carries no enforceable expectation of release from prison. The possibility of parole is purely within the state's discretion. See, Wash. Rev. Code § 9.95.100.

As in Corbitt, Respondents' sentences of life without parole did not result from retaliation, vindictiveness, or unwarranted charges. Nor have Respondents shown that Washington's statutes "have both the purpose and effect of penalizing the right

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11. Recent legislation authorizes Washington's Indeterminate Sentence Review Board to set minimum terms of confinement for such offenders. However, the statutory requirement for at least 20 years of continuous and meritorious service has been retained. Chapter 259, Washington Laws of 1989.

to plead not guilty." Corbitt, at 223, n. 13. Possible attainment of a conditional privilege after 20 years of continuous and meritorious confinement is not such a powerful influence as to coerce a murder defendant into pleading guilty. See Corbitt at 225; see also Brady v. United States, 397 U.S. 742, 751 (1970) ("We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged." (Emphasis added)).

Although the State argued in its Brief of Respondent to the Ninth Circuit Court of Appeals that Corbitt v. New Jersey, 439 U.S. 212 (1978) applied in both Robtoy's and Norman's situations, the Court of Appeals completely ignored this precedent. The Washington Supreme Court relied on Corbitt in its decision upholding the life without parole sentence for Robtoy and Norman in Frampton, supra, at 528-30, (Dimmick, J., concurring in part, dissenting in part). As the Washington Supreme Court's analysis shows, the distinction between the sentence that Robtoy and Norman have -- life without parole -- and the sentence they seek as a result of State v. Martin, 94 Wash. 2d 1, 614 P.2d 164 (1980) -- life with a possibility of parole -- is a distinction based on discretion similar to the Corbitt case.

Because this Court's opinion in Corbitt v. New Jersey was completely ignored by the Ninth Circuit Court of Appeals and the proper application of Corbitt compels a different result than obtained below, this Court should reverse the decision below and reinstate the decision of the United States District Courts.

CONCLUSION

If the Court of Appeals decisions below are allowed to stand without review by this Court, the potential implications to both state and federal criminal proceedings are enormous. First, other federal courts may rely on these Ninth Circuit opinions as authority for retroactively applying a "state created right" even though a state high court has specifically refused to do so.

Second, because the Court of Appeals' decisions ignored this Court's decision in Corbitt v. New Jersey, which limited the application of Jackson, the analysis from the decisions below could have a tremendous impact on the wide variety of cases in

which a Jackson issue is raised. Finally, decisions like the ones below serve to undermine the public's confidence in both its ability to legislate and the effectiveness of its state judiciary where the federal courts specifically reject the savings provisions built into most capital sentencing schemes. For all of the foregoing reasons, the Writ of Certiorari should be granted.

DATED This 25th day of September, 1989.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL ROBTOY,

Plaintiff-Appellant,

v.

LAWRENCE KINCHELOE,

Defendant-Appellee.

No. 86-3625

D.C. No. C 83-150-R

OPINION

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding

Argued and Submitted
July 13, 1988 - Seattle, Washington

Filed March 31, 1989

Before: Cecil F. Poole, William C. Canby, Jr. and
Edward Leavy, Circuit Judges.

Opinion by Judge Leavy

SUMMARY

Constitutional Law/Criminal Law

The court reversed the denial of a writ of habeas corpus, holding that a sentence of life without parole is unconstitutional when reserved for defendants who plead not guilty and go to trial.

Petitioner Michael Robtoy was convicted of murder after pleading not guilty and demanding a jury trial. He was sentenced to life without possibility of parole. Under Washington law, life without parole was reserved for defendants who pleaded not guilty and went to trial. After he was sentenced, Robtoy discovered that, had he plead guilty, the maximum sentence would have been life with the possibility of parole. He petitioned for a writ of habeas corpus, claiming that his sentence of life without parole was unconstitutional under **United States v. Jackson**, 390 U.S. 570 (1968), that he should have been allowed to withdraw his guilty plea, and that his confession was inadmissible under **Miranda**.

[1] Robtoy's original sentence of death was modified to life without possibility of parole, a sentence he could not have received if he had plead guilty. His sentence was therefore unconstitutional under **Jackson** because his assertion of his right to a jury trial was penalized. [2] **Jackson** applies to statutes that penalize the right to a jury trial, as well as to those that chill it. [3] **Jackson** is not limited to death penalty cases. The difference between life sentences with and without parole is a disparity significant enough to invoke **Jackson**. [4] There is no federal guaranteed right to have a court accept a plea of guilty. Accordingly, Robtoy failed to show that the state's refusal to allow him to change from a not guilty to a guilty plea deprived him of a federal right. Federal habeas corpus is therefore unavailable on that issue. [5] The factual findings of state appellate and trial courts that Robtoy's confession was valid are presumed correct unless the hearing was procedurally defective, the findings were not supported by the record, or the presumption is overcome by clear and convincing evidence. [6] The record supported the state courts' findings that Robtoy had no present desire for counsel during interrogation. The interrogating officer did not impinge on Robtoy's continuing option to cut off the interview.

COUNSEL

David B. Bukey, Seattle, Washington, for the plaintiff-appellant. Theresa L. Fricke, Assistant Attorney General, Department of Corrections, Olympia, Washington, for the defendant-appellee.

OPINION

LEAVY, Circuit Judge:

Michael Robtoy appeals the district court's denial of his petition for a writ of habeas corpus. Robtoy contends that his sentence of life without parole is unconstitutional under **United States v. Jackson**, 390 U.S. 570 (1968), because he could not have received such a sentence had he chosen to plead guilty rather than be tried by a jury. Robtoy also contends that the Washington Supreme Court's refusal to allow him to change his plea violated due process and that his confession is inadmissible under **Miranda**. We reverse the district court on the sentencing issue and affirm on the plea change and confession issues.

FACTS AND PRIOR PROCEEDINGS

In 1979 Robtoy was convicted by a jury of aggravated first degree murder and sentenced to death in Washington's Kitsap County Superior Court.

The facts leading to the conviction are as follows. Robtoy was arrested in Oregon for escape from a Washington prison and given **Miranda** warnings. Two days after his arrest, he was questioned in the Umatilla County jail for approximately three hours by Detective Dean and Officer Rusty Simpson. Robtoy admits that prior to questioning, he was informed of his **Miranda** rights and that he signed a written acknowledgement and waiver of those rights. During questioning, before he confessed, Robtoy told Dean, "maybe I should call my attorney." Dean testified in the state court pretrial hearing that shortly after Robtoy made the reference to counsel, Dean responded, "Mike, if you say you want your attorney, this conversation ends right here," and that Robtoy responded that he understood. Dean testified that he then told Robtoy that questioning would proceed and "if we arrived at a point where [Robtoy] didn't want to answer any questions, he didn't want to say anything more, or he wanted his attorney, to say so, and [Robtoy] said 'okay.'" In response to Dean's questions,

Robtoy confessed that he strangled David King and also confessed that he had murdered Ruth Pitts a year earlier.

Subsequently, Robtoy was taken to Kitsap County, Washington, given the **Miranda** warnings, questioned, served with a warrant for first degree murder, and again given the **Miranda** warnings. At his arraignment, Robtoy stood mute and the court entered a not guilty plea on his behalf. After conducting a pretrial hearing, the Kitsap County Superior Court ruled that Robtoy's confession was admissible, finding that Robtoy's reference to counsel was equivocal and that he validly waived his **Miranda** rights before he was questioned.

Following a jury trial for first degree aggravated murder, Robtoy was convicted and sentenced to death under Washington's death penalty statute, RCW 10.94.010-.900 and 9A.32.040, .046, and .047 (repealed 1981). In a case involving Robtoy and six other petitioners, a majority of the justices of the Washington Supreme Court found Washington's death penalty statute unconstitutional under **United States v. Jackson,** 390 U.S. 570 (1968), because the statute reserved the death penalty only for those who chose to go to trial. **State v. Frampton**, 95 Wn.2d 469, 480 (Dolliver, J.), 497 (Brachtenbach, C.J.), 497 (Williams, J.), 512-13 (Stafford, J.), 514 (Utter, J.), 627 P.2d 922, 927, 936, 944-45 (1981).

Although the sentence of life without parole was also reserved solely for defendants who chose to go to trial, a majority of the **Frampton** court declined to hold that life without parole was also unconstitutional. **Id.** at 500 (Rosellini, J.), 512 (Dore, J.), 513 (Stafford, J.) 530 (Dimmick, J.), 530 (Hicks, J.), 530 (Brachtenbach, C.J.), 627 P.2d at 938, 944, 952-53). Accordingly, Robtoy's death penalty sentence was modified to life without parole pursuant to a savings provision in the former death penalty statute. **Id.** at 526, 627 P.2d at 951; **see** former RCW 9A.32.047; 10.94.900.

After he was sentenced, Robtoy became aware that he had the right to plead guilty with a maximum sentence of life with parole.[1] Robtoy made a motion in the trial court to withdraw his

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1. In **State v. Martin**, 94 Wn.2d 1, 614 P.2d 164 (1980), decided shortly after Robtoy's conviction and sentence, the Washington Supreme Court construed Washington's death penalty statute, which has subsequently been revised and held that under that legislation, defendants to charges of aggravated murder had the right to plead guilty and receive a maximum sentence of life with parole.

not guilty plea and enter a plea of guilty. The Washington Supreme Court held that the trial judge had no jurisdiction to grant Robtoy's motion. **State v. Robtoy**, 98 Wn.2d 30, 653 P.2d 284 (1982).

Robtoy petitioned in federal district court for a writ of habeas corpus on the grounds that his sentence of life without parole was unconstitutional, that he should have been allowed to withdraw his guilty plea, and that his confession was inadmissible under **Miranda.** Adopting the report and recommendation of a magistrate, the court dismissed the confession issue on summary judgment. Later, the district court entered an order denying the sentencing claim. Robtoy timely appealed. The district court granted a certificate of probable cause.

DISCUSSION

Standard of Review

We review de novo a district court's decision to deny a petition for writ of habeas corpus. **Campbell v. Kincheloe**, 829 F.2d 1453, 1457 (9th Cir. 1987), **cert. denied**, 109 S. Ct. 380 (1988). While the historical factual findings of a state court are presumed correct and will not be set aside unless lacking fair support in the record, we may give different legal weight to such facts. **Hayes v. Kincheloe**, 784 F.2d 1434, 1436 (9th Cir. 1986), **cert. denied**, 108 S. Ct. 198 (1987); **see Sumner v. Mata**, 455 U.S. 591, 597 (1982) (per curiam).

I. Constitutionality of Sentence.

Robtoy contends that his sentence of life without parole is unconstitutional under **United States v. Jackson**, 390 U.S. 570 (1968). His contention has merit.

In **Jackson**, the United States Supreme Court concluded that the Federal Kidnaping Act, which allowed imposition of the death penalty solely be means of a jury verdict, was unconstitutional because it operated "to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." **Id.** at 581 (footnote omitted). In addition to concern with chilling the exercise of basic constitutional rights, the Court expressed concern with "penalizing those defendants who plead not guilty and demand jury trial." **Id.** at 582.

Robtoy was sentenced to death pursuant to Washington's death penalty statute, former RCW 10.94 and 9A.32. Under that

statute, the provisions allowing imposition of the death penalty (9A.32.040(1)) and of life without parole (9A.32.040(2)) applied only where the trial judge could reconvene the same jury that tried the defendant. **See** RCW 10.94.020(2), (9), (10); **see also State v. Martin**, 94 Wn.2d 1, 8, 614 P.2d 164, 167 (1980). Accordingly, the maximum penalty on a plea of guilty to first degree murder was life imprisonment with a possibility of parole. **See** RCW 9A.32.040(3) and 9.95.115; **see also Martin** at 9, 614 P.2d at 168. Both a Washington Supreme Court rule and the death penalty statute gave first degree murder defendants the right to have their guilty pleas accepted. **See Martin** at 4, 614 P.2d at 165-66; RCW 10.40.060.

[1] In **Frampton**, Robtoy's original sentence of death was modified to life without possibility of parole, a sentence Robtoy could not have received if he had pled guilty. Therefore, Robtoy's sentence is unconstitutional under **Jackson** because his assertion of his right to a jury trial was penalized. **See Jackson**, 390 U.S. at 583.

[2] The state contends that Robtoy "lacks standing" under **Jackson** because his exercise of his right to a jury trial was not chilled. However, **Jackson** applies to statutes that penalize the right to a jury trial, as well as to statutes that chill that right. **Jackson** , 390 U.S. at 583; **see also, Parker v. United States**, 400 F.2d 248, 252 (9th Cir. 1968), **cert. denied**, 393 U.S. 1097 (1969) (a defendant who exercises his right to a jury and incurs a sentence he otherwise would not have received has standing under **Jackson**); **Sims v. Eyman**, 405 F.2d 439, 446 n.3 (9th Cir. 1969) (Arizona defendant who received death penalty after trial by jury lacked standing under **Jackson** only because, under Arizona statute, judge as well as jury could impose the death penalty), **judgment vacated in part on other grounds**, 408 U.S. 934 (1972).

The state further questions Robtoy's standing under **Jackson**, arguing that at the time Robtoy was sentenced, there was no disparity between the sentences of defendants who pleaded guilty and defendants who exercised their right to a jury trial because **State v. Martin** had not yet been decided. **Martin** holds that Washington's former death penalty statute contained no provision whereby a defendant to first degree murder who pled guilty could receive the death penalty or a sentence of life without

parole. 94 Wn.2d at 9, 614 P.2d at 168. **Martin**, however, neither altered nor added to Washington's death penalty statute, but merely interpreted it.

[3] Finally, the state contends that **Jackson** does not apply where the death penalty is not at issue and the disparity in sentence is that between life with parole and life without possibility of parole. The state is incorrect. First, **Jackson** is not limited to death penalty cases. In this circuit the constitutionality of a costs provision in an income statute was analyzed under **Jackson** in **United States v. Chavez**, 627 F.2d 953, 955-57 (9th Cir. 1980), **cert. denied**, 450 U.S. 924 (1981). Second, the difference between life sentences with and without possibility of parole is a disparity significant enough to invoke **Jackson**. **See Solem v. Helm**, 463 U.S. 277, 297 (1983) (defendant's sentence of life without possibility of parole unconstitutional as disproportionate because a life without parole sentence is "far more severe than [a] life sentence"); **see also Chatman v. Marquez**, 754 F.2d 1531, 1536 (9th Cir.), **cert. denied**, 474 U.S. 841 (1985) (a prisoner is "substantially benefitted" when his sentence is changed from life without possibility of parole to life with possibility of parole).

We reverse the district court's denial of Robtoy's petition for a writ of habeas corpus on the ground that his sentence of life without parole was unconstitutional under **United States v. Jackson**.

II. Denial of Motion to Plead Guilty.

[4] Robtoy contends that the Washington Supreme Court's refusal to allow him to alter his plea to guilty violated his right to due process because his right to make a voluntary and intelligent plea was denied when he was not informed at his arraignment that a plea of guilty would result in a maximum sentence of life with parole. However, Robtoy's contention cannot constitute the basis for a writ of habeas corpus. Although Robtoy may have been misinformed by his counsel and the court as to the consequences of a guilty plea, he did allow a plea of not guilty to be entered for him. Thus, he cannot argue he was coerced to give up the rights inherent in a trial. Moreover, there is no federally guaranteed right to have a court accept a plea of guilty. **North Carolina v. Alford**, 400 U.S. 25, 39 n.11 (1970). Accordingly, Robtoy has failed to show that the state's refusal to allow him to change from a not guilty to a guilty plea deprived

him of a federal right; thus, we cannot grant him relief under 28 U.S. C. { 2254.

III. Robtoy's Confession.

Robtoy contends that his confession is inadmissible because the police elicited it in violation of his fifth amendment right to counsel during custodial interrogation. Robtoy contends that after he made an equivocal request for counsel, Detective Dean attempted to elicit incriminating remarks before Dean clarified whether Robtoy presently desired to speak to an attorney. Robtoy's contentions lack merit.

The fifth and fourteenth amendment right to counsel applies during custodial interrogation. **Miranda v. Arizona**, 384 U.S. 436, 444 (1966). If a suspect indicates in any manner that he wishes to consult with an attorney before speaking, there can be no questioning. **Id.** at 444-45. Police questioning after an ambiguous or equivocal request for an attorney must cease, except that police may clarify the suspect's desire for counsel. **United States v. Fouche**, 833 F.2d 1284, 1287 (9th Cir. 1987), **cert. denied**, 108 S. Ct. 1756 (1988). The critical factor in determining the validity of the government's behavior is "whether a review of the whole event discloses that the interviewing agent has impinged on the exercise of the suspect's continuing option to cut off the interview." **Id.** (citation omitted).

[5] Here, the Kitsap County trial court ruled that the confession was admissible even though it was preceded by Robtoy's equivocal request for counsel. The trial court did not specifically evaluate whether Dean's follow-up questioning was limited to ascertaining whether Robtoy presently desired an attorney. However, the state trial court's written findings include a discussion of the dialogue between Robtoy and Dean after Robtoy's equivocal request. The state trial court found that Dean "reinstructed him as to his rights; that the defendant understood them and understanding them did go ahead and make the statement that he wanted to [confess] -- that he did because he wanted to. He felt it was going to be a thing that he ought to do." It seems implicit in the trial court's finding that Dean clarified Robtoy's desire to see an attorney before Dean resumed questioning about the crime. Moreover, the Washington Supreme Court, in affirming the Kitsap County Superior Court's ruling admitting the confession, found as follows:

> After Robtoy made his equivocal statement regarding an attorney, Detective Dean sought clarification of Robtoy's words. There was no further interrogation about any offense until Dean was satisfied Robtoy toy had no present desire to have the presence of an attorney. Further, Robtoy was reminded by Detective Dean that he would cease questioning immediately if Robtoy wanted to remain silent or speak with an attorney.

State v. Robtoy, 98 Wash. 2d at 41, 653 P.2d at 291. The factual findings of both state appellate and trial courts are presumed correct under section 2254(d) unless the hearing was procedurally defective in some manner not at issue here, the findings are not supported by the record, or the petitioner overcomes the presumption by clear and convincing evidence. **Fendler v. Goldsmith**, 728 F.2d 1181, 1190-91, n.21 (9th Cir. 1983).

[6] Here, the record supports the state courts' findings that Dean, before he resumed interrogation, ascertained that Robtoy had no present desire for counsel. Dean testified before the state trial court that after Robtoy's reference to counsel, Dean twice reminded him that questioning would stop if Robtoy wanted an attorney and both times Robtoy said that he understood. Dean further testified that he told Robtoy he would resume questioning and whenever Robtoy did not want to say anything more without an attorney, Robtoy could say so. Officer Simpson, who was present during Robtoy's interrogation, corroborated Dean's testimony. Dean's and Simpson's testimony show that Dean did not "impinge . . . on the exercise of the suspect's continuing option to cut off the interview." **Fouche**, 833 F.2d at 1287.

CONCLUSION

We reverse the district court's denial of the writ of habeas corpus on the ground that Robtoy's sentence of life without parole is unconstitutional. We remand this case to the district court with the direction that it issue the writ and determine a reasonable time within which to resentence Robtoy.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEDLEY G. NORMAN, JR.,

Petitioner-Appellant,

v.

KENNETH DUCHARME,

Respondent-Appellee.

No. 87-4345

D.C. No. CV 85-975-T

OPINION

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding

Argued and Submitted
July 13, 1988 - Seattle, Washington

Filed March 31, 1989

Before: Cecil F. Poole, William C. Canby, Jr. and
Edward Leavy, Circuit Judges.

Opinion by Judge Leavy

SUMMARY

Constitutional Law/Criminal Law

Reversing the denial of a writ of habeas corpus, the court held that a sentence of life without possibility of parole was unconstitutional when reserved for defendants who plead not guilty and go to trial.

Petitioner Nedley Norman was convicted of murder after pleading not guilty and demanding a jury trial. He was sentenced to life without possibility of parole. Under Washington law, life without parole was reserved for defendants who pleaded not guilty and went to trial. Norman petitioned the district court for a writ of habeas corpus on the grounds that his sentence of life without parole was unconstitutional and his confession was admissible based on findings of fact and conclusions of law. The record showed that at the time of his arrest, Norman was shown a copy of his arrest warrant, which stated that a murder information had been filed against him. The record showed also that after his arrest, Norman asked an officer whether he should get an attorney, but the officer declined to advise him.

[1] For the reasons stated in **Robtoy v. Kincheloe**, ___ F.2d ___ (1989), Norman's sentence of life without possibility of parole was unconstitutional. [2] The right to counsel applies during custodial interrogation. If a suspect indicates in any6 manner that he wishes to consult with an attorney before speaking, there can be no questioning. [3] Police questioning after an ambiguous or equivocal request for an attorney must cease, except that police may clarify the request. [4] Mere mention of an attorney does not constitute an equivocal request for counsel. Norman's question to the officer did not rise to the level of an equivocal request for counsel. [5] Norman's bare allegation that he requested counsel of another officer was not sufficient to overcome the statutory presumption that the state court's findings were correct. [6] Norman's right to counsel attached before his interrogation because an information had been filed against him, which under Washington law commenced formal judicial proceedings against him. [7] There was no reason to question the state court's finding that Norman's confession was not induced by any false statement. [8] Norman alleged no circumstances that would make it reasonable to question the state court's finding that his confession was not induced by a police threat. [9] Since Norman was interrogated for no more than two hours before he confessed,

he received **Miranda** warnings and signed a waiver, there was no basis to conclude that his confession was involuntary.

COUNSEL

John Midgley, Smith, Midgley & Pumplin, Seattle, Washington, for petitioner-appellant.
Linda A. Dalton and Theresa L. Fricke, Assistant Attorney Generals, Olympia, Washington, for respondent-appellee.

OPINION

LEAVY, Circuit Judge:

Nedley G. Norman appeals the district court's denial of his petition for a writ of habeas corpus. Norman contends that his sentence of life without parole is unconstitutional under **United States v. Jackson**, 390 U.S. 570 (1968), because he could not have received such a sentence had he chosen to plead guilty rather than be tried by a jury. Norman also contends that his confession was inadmissible on various constitutional grounds. We reverse the district court on the sentencing issue and affirm on the confession issue.

FACTS AND PRIOR PROCEEDINGS

In 1978 Norman was convicted of first degree aggravated murder and sentenced to death in Pierce County Superior Court for the shooting death of Deputy Sheriff Dennis Allred.

Norman was arrested pursuant to a warrant issued after the filing of an information charging him with first degree murder.[1] 1 He was arrested and advised of his **Miranda** rights. After handcuffing him, Detective Dean showed Norman a copy of his arrest warrant. The warrant stated that an information had been filed, charging Norman with first degree murder.

After being arrested, Norman was transported to the County Sheriff's office. During the drive, Norman asked Officer Henry whether he should get an attorney. Henry declined to advise him. At the County Sheriff's office, Norman was read **Miranda** warnings again, this time from a paper that contained a written waiver, which he signed.

1. Subsequently, an amended indictment charging aggravated first degree murder was filed.

Subsequently, Dean questioned Norman and typed a copy of the questions and Norman's answers. The typed statement, which Norman signed, contained Norman's confession that he had killed Allred. Norman was arraigned approximately two and a half hours after his arrest.

In a pretrial hearing, the state court held that Norman's confession was admissible based on the following written findings and conclusions: (1) Norman did not request an attorney before he made his statement; (2) Norman was not induced to confess by threats, promises, or tricks; (3) the typed report of Norman's responses to Dean's questions was not altered after Norman initialed and signed it; (4) Norman had the mental capacity to waive his **Miranda** rights and he did waive those rights; (5) while Norman gave his statement, his hands were not malfunctioning and he was not hyperventilating. The Washington Court of Appeals affirmed the trial court's admission of Norman's confession. The Washington Supreme Court denied review.

Following a jury trial for first degree aggravated murder, Norman was convicted and sentenced to death under Washington's death penalty statute, RCW 10.49.010-.900 and 9A.32.040, .046, and .047 (repealed 1981). In a case involving Norman and six other petitioners, a majority of the justices of the Washington Supreme Court found Washington's death penalty statute unconstitutional under **United States v. Jackson**, 390 U.S. 570 (1968), because the statute reserved the death penalty only for those who chose to go to trial. **State v. Frampton**, 95 Wash. 2d 469, 480 (Dolliver, J.), 497 (Brachtenbach, C.J.), 497 (Williams, J.), 512-513 (Stafford, J.), 514 (Utter J.), 627 P.2d 922, 927, 936, 944-45 (1981).

Although the sentence of life without parole was also reserved solely for defendants who chose to go to trial, a majority of the **Frampton** court declined to hold that life without parole was also unconstitutional. **Id.** at 500 (Rosellini, J.), 512 (Dore, J.), 513 (Stafford, J.), 530 (Dimmick, J.), 530 (Hicks, J.), 530 (Brachtenbach, C.J.), 627 P.2d at 938, 944, 952-53. Accordingly, Norman's death penalty sentence was modified to life without parole pursuant to a savings provision in the former death penalty statute. **Id.** at 526, 627 P.2d at 951; see former RCW 9A.32.047; 10.94.900.

Norman petitioned in federal court for a writ of habeas corpus on the grounds that his sentence of life without parole was unconstitutional and his confession inadmissible under the fifth, sixth, and fourteenth amendments. A federal magistrate recommended that Norman be granted relief on the sentencing issue and denied relief on the confession issue. The district court, however, entered an order denying the petition for writ of habeas corpus on all grounds raised. Norman timely appealed. The district court denied a certificate of probable cause; this court granted one.

DISCUSSION

Standard of Review

We review de novo a district court's decision to deny a petition for writ of habeas corpus. **Campbell v. Kincheloe**, 829 F.2d 1453, 1457 (9th Cir. 1987), **cert. denied**, 109 S.Ct. 380 (1988). While the historical factual findings of a state court are presumed correct and will not be set aside unless lacking fair support in the record, we may give different legal weight to such facts. **Hayes v. Kincheloe**, 784 F.2d 1434, 1436 (9th Cir. 1986), **cert. denied**, 108 S.Ct. 198 (1987); **see Sumner v. Mata**, 455 U.S. 591, 597 (1982)(per curiam).

I. Constitutionality of Sentence

[1] Norman contends that his sentence of life without parole is unconstitutional under **United States v. Jackson**, 390 U.S. 570 (1968). His contention has merit. For the reasons stated in **Robtoy v. Kincheloe**, decided this date, we reverse the district court's denial of Norman's petition for a writ of habeas corpus on the ground that his sentence of life without parole is unconstitutional under **Jackson**.

II. Admissibility of Confession

A. **Norman's Alleged Requests for Counsel**

Norman contends that his confession is inadmissible because the police elicited it during custodial interrogation after he asked Officer Henry, when being transported to the County Sheriff's office, if he should see a lawyer, and allegedly requested of Detective Dean, during interrogation, to allow Norman to call an attorney. Norman's contentions lack merit.

[2] The fifth and fourteenth amendment right to counsel applies during custodial interrogation. **Miranda v. Arizona**, 384 U.S. 443 (1966). If a suspect indicates in any manner that he wishes to consult with an attorney before speaking, there can be

no questioning. **Id.** at 445.

[3] **Question to Henry**. Police questioning after an ambiguous or equivocal request for an attorney must cease, except that police may clarify the request. **United States v. Fouche**, 776 F.2d 1398 (9th Cir. 1985), **cert. denied**, 108 S.Ct. 1756 (1988). In **Fouche**, the court found an equivocal request for counsel when the defendant was read his rights, stated he understood them, signed a form waiving the right to counsel, then "stated that he might want to speak to a lawyer, and wanted to make a phone call." **Id.** at 1401.

[4] Norman does not allege that he ever stated to Henry that he might want to see an attorney, wanted to make a phone call, asked why he shouldn't see an attorney and asked to speak to Henry's superior. Mere mention of an attorney does not constitute an equivocal request for counsel, as the word "attorney" is not talismanic. **Bruni v. Lewis**, 847 F.2d 561, 564 (9th Cir. 1988) (**United States v. Jardina**, 747 F.2d 945, 949 (5th Cir. 1984), **cert. denied**, 470 U.S. 1058 (1985)), **cert. denied**, 109 S.Ct. 403 (1988). We conclude that Norman's question to Henry did not rise to the level of an equivocal request for counsel.

[5] **Alleged Request to Dean**. Norman testified in state court proceedings that he told Officer Dean he wanted counsel, and that Dean refused to allow him to obtain counsel. Dean testified that Norman's assertions were absolutely false. The state trial court found that Norman did not request counsel of Dean. Absent certain circumstances, the state court's findings of fact are entitled to a presumption of correctness under 28 U.S.C. § 2254(d). **See Fendler v. Goldsmith**, 728 F.2d 1181, 1190-91 n. 21 (9th Cir. 1983), **citing Brewer v. Williams**, 430 U.S. 387, 403 (1977). Norman's bare allegation in his petition that he requested counsel of Dean is not sufficient to overcome the statutory presumption that the state court's findings were correct. **See Townsend v. Sain**, 372 U.S. 293, 312-313 (1963).

B. **Validity of Norman's Written Waiver**

Norman contends his waiver was not valid under the sixth amendment because he was unaware an information had been filed and because the waiver was uncounselled. Norman's contentions lack merit.

The validity of a waiver is a mixed question of law and fact requiring independent federal review. **Terrovona v. Kinche-**

loe, 852 F.2d 424, 428 (9th Cir. 1988). Under both the fifth and sixth amendments, waiver must be voluntary and a knowing and intelligent relinquishment of a known right or privilege. **Brewer v. Williams**, 430 U.S. at 404.

[6] **Knowing Waiver Under the Sixth Amendment**. The sixth amendment right to counsel attaches when formal judicial proceedings are initiated against an individual. **United States v. Karr**, 742 F.2d 493, 495 (9th Cir. 1984). [2]This right to counsel attached before Norman's interrogation and confession because an information had been filed against him. The Supreme Court has declined to decide whether an accused must be told that he has been formally charged before he can knowingly and intelligently waive the sixth amendment right: "[W]e do not address the question of whether or not an accused must be told that he has been indicted before a postindictment Sixth Amendment waiver will be valid. Nor do we even pass on the desirability of so informing the accused -- a matter that can be reasonably debated." **Patterson v. Illinois**, 108 S.Ct. 2389, 2396-97 n. 8 (1988). Here, Norman was at the time of his arrest shown a copy of his arrest warrant, which stated that an information charging first degree murder had been filed. Even if Norman had no opportunity to read the entire warrant, the display of the warrant was sufficient to apprise a lay person such as Norman of the nature of the crime for which he was being arrested and the gravity of his situation. Accordingly, Norman's waiver was knowing under the sixth amendment whether or not he knew an information had been filed.

Whether Uncounselled Waivers Are Per Se Invalid. Norman's contention that this court should hold that uncounselled waivers made after initiation of formal judicial proceedings are per se invalid under the sixth amendment is refuted by **Patterson v. Illinois**. There the Supreme Court upheld an uncounselled waiver by an indicted defendant who was given **Miranda** warnings. **Patterson**, 108 S.Ct. at 2395.

Voluntariness of Waiver. Norman attempts to raise an issue as to the voluntariness of his written waiver. He appears to maintain that since he did not tell the officer when he signed the

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2. In the State of Washington, formal judicial proceedings are fully commenced against a criminal defendant upon the filing of an information by a prosecutor. Washington Criminal Rule 2.1(a); RCWA 10.7.010.

form that he was going to give a statement, and did not indicate orally or by conduct other than his signature that he intended to waive his rights, he did not waive them. An express written waiver of the right to remain silent, while not inevitably sufficient to establish waiver, is usually strong proof. **North Carolina v. Butler**, 441 U.S. 369, 373 (1979). Norman's allegations are not sufficient to raise a question about the voluntariness of his waiver.

C. **Voluntariness of Norman's Confession**

Norman contends that his confession was involuntary. Norman's contention lacks merit.

Involuntary confessions in state criminal cases are inadmissible under the fourteenth amendment. **Blackburn v. Alabama**, 361 U.S. 199, 207 (1960). The voluntariness of a confession is evaluated by reviewing both the police conduct in extracting the statements and the effect of that conduct on the suspect. **Miller v. Fenton**, 474 U.S. 104, 116 (1985). Absent police misconduct causally related to the confession, there is no basis for concluding that a confession was involuntary in violation of the fourteenth amendment. **Colorado v. Connelly**, 107 S.Ct. 515, 521 (1986) (**but see** Justice Brennan's dissent at 525-5 28).

Norman contends that his confession was involuntary because eight police were present during his arrest, they were arresting him for the murder of a police officer, they were interrogating him with the purpose of convicting him because an information had been filed, and they failed to follow their customary procedure of tape recording suspects' statements. Such allegations, even if true, do not constitute police misconduct and thus cannot render his confession involuntary under the fourteenth amendment. **See Colorado v. Connelly**, 107 S.Ct. at 521.

Norman also contends his confession was involuntary because the police unlawfully delayed his arraignment. However, Norman has not raised an issue of police misconduct in connection with the approximately two and a half hours that elapsed between his arrest and arraignment. **Cf. United States v. Manuel**, 706 F.2d 908, 914 (9th Cir. 1983) (delay exceeding six hours is one factor to be considered in evaluating voluntariness of a confession under 19 U.S.C. § 3501).

[7] Norman also alleges that his confession was involuntary because Detective Dean told him that two of his codefendants told the police Norman shot a policeman, when in reality only one of the co-defendants so stated. The state trial court found that Norman's confession was not induced by any false statement. There is no reason to question that finding. **See Frazier v. Cupp**, 394 U.S. 731, 739 (1969) (interrogators misrepresenting to the defendant that his co-defendant had already confessed held no ground for finding defendant's confession involuntary).

[8] Norman also alleges his confession was induced by the police's "threat" that what happened would depend on Norman's side of the story. The state trial court specifically found that Norman was not threatened. Norman alleges no circumstances that would make it reasonable to question the state court's finding; moreover, the alleged threat does not appear to rise to the level of police misconduct in view of the fact that any defendant's fate depends in part on what he tells the police.

Finally, Norman alleges that at the time of his confession he suffered psychological trauma that made him incapable of a voluntary confession. The state trial court made written findings that Norman had the mental capacity and free will necessary to make a valid waiver of his right to remain silent and that he confessed after he made a knowing, intelligent, and voluntary waiver of his rights to remain silent. According to the summary of psychiatric evidence in Norman's brief, neither his own nor the state's psychiatrist, both of whom testified at the state court pretrial hearing, were willing to testify that Norman's confession was involuntary.

[9] Norman admits that he was interrogated for no more than two hours before he confessed. Norman received the **Miranda** warnings and signed a waiver, which is "a circumstance quite relevant to a finding of voluntariness." **Frazier v. Cupp**, 394 U.S. at 739. Norman has failed to show police misconduct. Accordingly, there is no basis to conclude that Norman's confession was involuntary.

CONCLUSION

We reverse the district court's denial of the writ of habeas corpus on the ground that Norman's sentence of life without parole is unconstitutional. We remand this case to the district court with the direction that it issue the writ and determine a reasonable time within which to resentence Norman.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C83-150R

REPORT AND RECOMMENDATION

MICHAEL ROBTOY,

Petitioner,

v.

LAWRENCE KINCHELOE

Respondent.

INTRODUCTION

Robtoy seeks federal habeas corpus relief from his state criminal conviction for aggravated first degree murder. He was sentenced to death by Judge Jay Hamilton in Superior Court for Kitsap County in June of 1979. The Supreme Court of Washington later modified the sentence to life imprisonment without possibility of parole. State v. Frampton, et al., 98 Wn.2d 30 (1981).

Robtoy raises four grounds:

1. His confession was involuntary because, during questioning, he said, "Maybe I should talk to an attorney."
2. The trial court erroneously admitted evidence that Robtoy had committed an earlier murder.
3. State law interfered with his constitutional right to jury trial by permitting a harsher sentence after trial and conviction than if a guilty plea were entered.
4. The trial court erroneously refused to permit him to change his plea to guilty following trial and conviction.

The first two claims challenge the constitutional validity of the conviction itself. The third and fourth claims represent an

effort by petitioner to obtain a further modification of his sentence to permit the possibility of parole.

By agreement between the Court and the parties, only the first two claims are to be considered initially. Counsel for respondents ("the State") have therefore filed a Motion for Partial Summary Judgment. The third and fourth claims will be briefed and argued, if necessary, following decision on the first two.

EXHAUSTION OF STATE REMEDIES

Robtoy raised all four claims on direct appeal, and the Washington Supreme Court considered each of them on the merits in State v. Robtoy, 98 Wash. 2d 30, 653 P.2d 284 (1982). He has therefore exhausted his state court remedies.

NO EVIDENTIARY HEARING REQUIRED

Pursuant to state procedures, the trial judge conducted an extensive evidentiary hearing, prior to trial, on the admissibility of Robtoy's confession. The State has filed with this court a transcript of relevant portions of that hearing, and a copy of the trial judge' findings and conclusions.[1] The Supreme Court of Washington accepted the trial court's findings of fact, 98 Wn.2d at 40-41. This court must presume those findings to be correct, 28 U.S.C. § 2254(d); Sumner v. Mata, 449 U.S. 539 (1981). To dispel that presumption, a petitioner must allege and show that one of the eigh: conditions listed in § 2254(d) is applicable.

Robtoy has neither alleged nor shown that any of those conditions applies. His challenge relates to the legal consequences of the established facts. The findings of fact by the trial judge are therefore binding, and there is no need for an evidentiary hearing.

STATEMENT OF FACTS

Robtoy was charged with aggravated first degree murder under former RCW ch. 10.94 for the strangulation killing of David King in Port Orchard on December 4, 1978.

The record establishes that Robtoy decided to abscond while on furlough from the Clearwater Corrections Center. He sought assistance and transportation from the victim, David King, an acquaintance of Robtoy's furlough sponsor. King agreed to assist him, and they went to King's apartment where they engaged in homosexual activities. King then refused to assist Robtoy in

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1. Oral findings and conclusions are at pages 596-606 of transcript; written findings and conclusions are at pages 219-231 of the documentary record.

fleeing, advising him to turn himself in. Robtoy stated that he then panicked and choked King, fearing King would turn him in for violations of his furlough and prevent his escape. Following the killing, Robtoy fled with several articles of King's property.

Robtoy was subsequently arrested for escape in Oregon on February 5, 1979. He was interviewed in Oregon two days later, on February 7, by Detective Dean of Kitsap County and Trooper Simpson, a local officer. He gave a confession to the King homicide, and also confessed to the killing of Ruth Pitts in Gig Harbor about a year earlier, on February 8, 1978. That confession is the subject of Robtoy's first challenge. As found by the trial judge, the facts surrounding that confession were as follows.

The questioning took place at the Umatilla County Jail at Pendleton, Oregon. It began at about 1:30 p.m., and consumed about three hours. It was not recorded on tape or by a court reporter or stenographer.

The officers first advised Robtoy of his constitutional rights. He signed a written acknowledgment and waiver of each of those rights. Detective Dean then took a statement from Robtoy, in the presence of Trooper Simpson, by typing a question, reading it to Robtoy and typing his answer. At the end of each page, Robtoy read the entire page, made corrections if he desired, and then initialed the bottom of the page. At the end of three pages of questioning, Robtoy said words to the effect, "Maybe I should talk to an attorney," while looking towards the floor and rubbing his head. Detective Dean responded with words to the effect, "If you say you want an attorney, our conversation ends right here." Robtoy responded, "I know that." After a brief pause Detective Dean further indicated, "I'll go ahead and start typing questions and try not to make them difficult. If you want to stop or to have an attorney just say so," Thereafter Robtoy finished the remainder of the statement, never requesting that the interview cease and never requesting an attorney.

The trial judge specifically found that Robtoy's comment about an attorney was equivocal, i.e. was not an unequivocal request to consult with counsel. In so finding, the judge relied upon several factors. The first is "the plain English words used by the defendant," i.e., the comment on its face is equivocal. Secondly, from prior contacts with the law, defendant was fully

familiar with his rights and knew how to exercise them. On at least fourteen prior occasions he had been advised of his Miranda rights. On some occasions he had waived those rights and talked with officers. On other occasions he had exercised his rights and refused all talk to officers.

A third reason for concluding Robtoy's comment was equivocal was that, at a later point in the questioning, he said, "What can an attorney do for me?"

The trial judge also relied upon the credibility of the witnesses at the hearing. Finally, he cited the fact that Robtoy never acted on Detective Dean's response that, if at any point Robtoy wanted to talk to an attorney, Dean would stop the questioning.

Considering all factors, the trial judge concluded Robtoy's comment was equivocal, and that before he continued with his confession he had voluntarily, intelligently and knowingly waived his Miranda rights.

The trial judge also permitted the State to introduce evidence of Robtoy's separate murder of Ruth Pitts about a year earlier. In both cases, the victims were nude, showed signs of sexual activity, and had been strangled, in King's case by an electrical cord and in Pitts' case by a T-shirt. The prosecutor persuaded the trial judge that evidence of the Pitts murder showed premeditation and motive for the King murder.

ADMISSIBILITY OF CONFESSION

The parties correctly cite Edwards v. Arizona, 451 U.S. 477 (1981) and Miranda v. Arizona, 384 U.S. 436 (1966), as the starting point in determining whether Robtoy's confession was voluntary and admissible.

Miranda requires that the defendant be told about his constitutional rights and how to exercise them.

> The defendant may waive effectuation of these rights, provided thewaiver is made voluntarily, knowingly, and intelligently. If, however, heindicates in any manner and at any stage of the process that he wishes toconsult with an attorney before speaking, there can be no questioning . . . . The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right torefrain from answering any further inquiries until he has

consulted with an attorney and thereafter consents to be questioned. 384 U.S. at 444.

The Supreme Court goes on to indicate specifically how requests for an attorney are to be dealt with:

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. 384 U.S. at 474-75
>
> ...any evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. 384 U.S. at 476

Edwards further clarifies the procedures required if waiver of the right to counsel is to be found.

> ...we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. 451 U.S. at 484-485.

Miranda and Edwards, however, prescribe how law enforcement officers must respond to unequivocal requests to consult with counsel. But the parties have cited no case from the United States Supreme Court or the United States Court of Appeals for the Ninth Circuit dealing with equivocal comments about counsel.

In unanimously affirming Robtoy's conviction en banc, the Supreme Court of Washington relied heavily upon a Fifth Circuit decision, Nash v. Estelle, 597 F.2d 513 (5th Cir.), cert. denied, 444 U.S. 981 (1979). In Nash, the defendant said, "I

would like to have a lawyer, but I'd rather talk to you." The prosecutor told him if he wanted a lawyer, he couldn't talk to him, and the defendant then stated he would rather talk to the prosecutor. He then gave a statement. 597 F.2d at 516-517. The Fifth Circuit found the statement admissible holding that after an equivocal request for an attorney it is proper for the interrogator to continue questioning, but only to clarify whether the defendant wants an attorney or to make a statement. As long as clarification is the only purpose of questioning until the defendant's intention is clarified, as a desire to make a statement without counsel, any statement that follows is admissible. 597 F.2d at 517-518.

In another similar case, decided shortly after Nash, the court reached a different result. Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979). In that case the defendant announced his desire to make a statement but added that he first wanted to tell his story to an attorney. The officers told him an attorney couldn't relate his story to the police and that an attorney would tell him to say nothing. 601 F.2d at 769. The Fifth Circuit held that the crucial difference from Nash, which dictated a different result, was that in Thompson the inquiry after the equivocal request took the form of a discussion of whether having counsel would be in the suspect's best interests. The court said, "Such measures are foreign to the purpose of clarification, which is not to persuade but to discern." 601 F.2d at 772.

In its thorough and careful opinion affirming Robtoy's conviction, the Supreme Court of Washington concluded that Nash established the appropriate standard governing equivocal requests, and that the officers interrogating Robtoy had met that standard. I recommend this court reach the same conclusion. Robtoy understood his rights, from prior contacts with the law, from the advice given him at the outset of the questioning, and from the direct reminder Detective Dean furnished him immediately after his equivocal comment. Although he never said, "I've decided I do not want an attorney," his conduct establishes a knowing, voluntary and intelligent waiver of his rights. He never asked for an attorney, then or later, and never halted the questioning, despite the fact that Detective Dean specifically advised him he could do so at any time. Robtoy was not cajoled or tricked into waiver of his rights; nor was his statement threatened or coerced. (Findings of Fact, p. 229 of document record). Unlike the interro-

gating officers in Thompson, Detective Dean and Trooper Simpson never attempted to dissuade Robtoy from exercising his right to consult with counsel. They left the choice entirely to Robtoy who, fully aware of his rights, elected to continue answering questions.

This court should therefore find that Robtoy's confession as to the King murder was properly admitted.

EVIDENCE OF PITTS MURDER

Robtoy's second claim is that the admission of evidence of the Pitts murder denied him due process of law.

As already noted, there were similarities between the two murders. The prosecutor persuaded the trial judge that evidence that Robtoy had murdered Pitts was relevant to show premeditation and motive for his murder of King. While admitting the evidence, the trial judge gave a cautionary instruction that the Pitts evidence could be considered only for the limited purpose of showing premeditation and motive. 98 Wn 2d at 34.

But the Supreme Court of Washington failed to perceive the relevance of the evidence, and concluded the prejudicial effect outweighed any relevance. While holding the admission of the evidence was error, the court concluded,

> ". . . that exclusion of the Ruth Pitts homicide evidence would not have changed the outcome of this case. Indeed, the remaining untainted evidence, including Robtoy's confession to the David King murder, can fairly be characterized as overwhelming." 98 Wn 2d at 44-45.

In their briefs, the parties cite Bryson v. Alabama, 634 F.2d 862 (5th Cir. 1981), and characterize the issue on habeas corpus as whether the erroneous admission of the evidence resulted in "fundamental unfairness." Even if this Fifth Circuit standard were appropriate here, this court would be required to reject the challenge, for the reasons stated by the Supreme Court of Washington.

But the Ninth Circuit has spoken more directly to this issue in Fritchie v. McCarthy, 664 F.2d 208, 212 (9th Cir. 1981). The facts in Fritchie are strikingly similar to those in this case. In a trial for a California murder, the trial judge admitted evidence of Fritchie's confession to a similar, earlier murder in Florida, concluding it was proper "identity" evidence under California

rules. In reviewing a habeas challenge to the conviction, the Ninth Circuit observed that the evidence question was a matter of state law, and not part of the habeas proceeding. Distinguishing direct appeals of federal conviction, the court observed:

> "the scope of review is narrower when federal courts review state proceedings for their validity under the U. S. Constitution. The Supreme Court has explicitly held that a state practice of permitting a jury to hear evidence of prior crimes does not violate the due process clause of the Fourteenth Amendment, at least where the trial judge gives a limiting instruction. Spencer v. Texas, 385 U.S. 554, 561, 87 S.Ct. 648, 17 L. Ed 2d 606 (1967)." 664 F.2d at 212, n. 1.

Under either standard, therefore, the admission of evidence of the Pitts murder, while erroneous under Washington law, provides no basis for federal habeas corpus relief.

RECOMMENDATION

For the reasons stated, the Motion for Partial Summary Judgment as to the first two claims should be granted.

A form of Order accompanies this Report and Recommendation.

DATED this 31 day of January, 1984.

JOHN L. WEINBERG
United States Magistrate

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C83-150R

ORDER DENYING PETITION
FOR HABEAS CORPUS

MICHAEL ROBTOY,

Petitioner,

v.

LAWRENCE KINCHELOE, et al.,

Respondents.

THIS MATTER comes before the court on a petition by petitioner Michael Robtoy for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Having considered the petition together with all memoranda and exhibits filed in support of and in opposition to the petition, being familiar with the rest of the record in this case, and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

Petitioner Robtoy ("Robtoy") seeks habeas corpus relief under 28 U.S.C. § 2254 from his sentence of life imprisonment without the possibility of parole imposed as a result of his Washington state conviction for aggravated first degree murder. On February 5, 1979, Robtoy was arrested and charged with first degree murder. At his arraignment, Robtoy's attorney sought and was granted additional time to investigate a possible insanity plea. However, due to the state speedy trial rule, the court entered a plea of not guilty on Robtoy's behalf.

On February 26th, the state filed notice of intent to seek the death penalty. At this time Washington's sentencing procedure worked as follows: Once the prosecution filed notice that it would seek the death penalty, issues of guilt and sentencing had to be decided by a jury. RCW 9A.32.040 (1)-(2). Once guilt was established, the sentence depended upon whether the jury found aggravating circumstances. A finding of such circumstances automatically resulted in the imposition of the death penalty (RCW 9A.32.040(2)), while the jury's failure to make such a finding resulted in a sentence of life imprisonment without the possibility of parole. RCW 9A.32.040(2). All other first degree murder convictions resulted in a life sentence with the possibility of parole. RCW 9A.32.040(3). This statutory scheme appeared to preclude guilty pleas whenever the prosecution filed for the death penalty, unless the prosecution agreed to a plea bargain. However, an opinion issued by the Washington Attorney General in 1979 concluded that guilty pleas had to be allowed. Op. Atty Gen. 1979, No. 10. Robtoy's lawyers, unaware of this opinion, informed Robtoy that he could not plead guilty in a capital case without the concurrence of the prosecution, and that a plea of guilty would automatically result in a sentence of life without the possibility of parole. Washington v. Robtoy, hearing on Motion to Withdraw Plea, Verbatim Report of Proceedings, Superior Court Kitsap County, Cause # 46328-0, October 5, 1981.

Consequently, when asked to enter a plea at arraignment on February 26, 1979, Robtoy stood mute, causing the trial court to allow the original plea of not guilty to stand. Id. at 4. Plea bargaining negotiations took place around this time, with Robtoy rejecting the state's offer of life imprisonment without parole and the state rejecting Robtoy's proposal of life with the possibility of parole. Respondent's Memorandum on Cross Motion for Partial Summary Judgment, November 27, 1984 ("Respondent's Memo") at 5-6. After the trial court denied Robtoy's motion to suppress, he offered, and the state rejected, a plea of guilty to aggravated first degree murder in exchange for a life sentence without possibility of parole. Id. at 6. Robtoy went to trial pursuant to the plea of not guilty entered for him by the court. The jury convicted Robtoy of aggravated first degree murder and, on June 4, 1979, he was sentenced to death.

Shortly after Robtoy had been convicted and sentenced to death, a state Superior Court judge in another case, acting pursuant to the commonly accepted understanding, refused to allow a defendant to plead guilty after the prosecution had filed for the death penalty. The defendant appealed and, on August 15, 1980, the Washington Supreme Court held that under Washington court rules, a defendant had a right to plead guilty to a charge of aggravated murder and thereby receive a maximum sentence of life imprisonment with the possibility of parole. State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980). However, the Martin holding resulted in a sentencing scheme which imposed the death penalty only on those seeking a jury trial, and, therefore, was unconstitutional under United States v. Jackson, 390 U.S. 570 (1968). In a subsequent decision, State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981), the Washington court recognized this problem, held the sentencing scheme unconstitutional, and vacated five death sentences, including Robtoy's. However, a 6-3 majority in Frampton held that it was constitutional to reserve a sentence of life imprisonment without parole only for those convicted after a trial. Robtoy's original sentence of death was thus changed to life imprisonment without parole.

Robtoy then moved in Superior Court for leave to change his plea from not guilty to guilty, so that he could receive the lesser penalty of life with parole, the maximum permitted under Martin. The Superior Court held an evidentiary hearing, but declined to rule on the motion. Since Robtoy had an appeal from his conviction pending in the Washington Supreme Court, the Superior Court held that without leave from the Supreme Court, it lacked jurisdiction to act on Robtoy's motion. Respondent's Memo at 4-5. On September 25, 1981, the Supreme Court denied leave for the Superior Court to act. On November 10, 1982, the Court decided Robtoy's appeal and denied Robtoy's motion to withdraw his plea. State v. Robtoy, 98 Wn.2d 30, 45, 653 P.2d 284 (1982).

On January 24, 1983, having exhausted his state remedies, Robtoy filed a petition seeking federal habeas corpus relief on four separate grounds. On February 16, 1984, this court granted the state's motion for partial summary judgment, thereby disposing of grounds one (alleged Miranda violation) and two (admissibility of prior conviction). The instant cross motions for

summary judgment concern grounds three and four of the habeas petition: (3) whether it is constitutionally permissible to mandate the imposition of a more severe penalty (life without parole) after a trial by jury than that imposed after a guilty plea (life with parole); and (4) whether the state court's failure to allow Robtoy to withdraw his not guilty plea in favor of a plea of guilty that would entitle him, under state law, to the less severe sentence of life with the possibility of parole, violated his federally protected due process rights.

II. CONSTITUTIONALITY OF SENTENCING SCHEME

Robtoy challenges the Washington Supreme Court's decision to impose a more severe sentence on him than he would have received had he pled guilty. Robtoy argues that the sentencing disparity is unconstitutional under the principle established by the United States Supreme Court in Jackson, supra. Memorandum In Support of Petitioner's Motion for Partial Summary Judgment, November 5, 1984 ("Petitioner's Support Memo") at 3.

In Jackson, the Supreme Court held unconstitutional the sentencing scheme embodied in the Federal Kidnapping Act: a defendant pleading guilty could receive a maximum sentence of life imprisonment, while a defendant who asserted his right to a jury trial could be sentenced to death. After noting that there is no constitutional right to plead guilty, the Court found that imposing the death penalty only on those who asserted their right to a jury trial had the "inevitable effect" of discouraging or chilling the exercise of a fundamental constitutional right. Id. at 581-83. The court approved of the statutory attempt to limit imposition of the death penalty to situations in which a jury recommends it. However, because this end could have been achieved without the chilling effect, the court found that the statute "needlessly penalized" the assertion of the right to a jury and thus was unconstitutional. Id.

But before turning to the merits of Robtoy's challenge under Jackson to the sentencing disparity in his case, the court must first determine whether he has standing to argue the claim. Pickens v. Lockhart, 714 F.2d 1455, 1459 n. 3 (8th Cir. 1983); Bonner v. Wyrick, 650 F.2d 150 (8th Cir. 1981); Parker v. United States, 400 F.2d 248, 252 (9th Cir. 1968), cert. denied, 393 U.S. 1097 (1969); Robinson v. United States, 394 F.2d 823, 824 (6th

Cir. 1968). The state argues that in order to have standing under Jackson, Robtoy must have suffered the subjective chilling effect of the sentence disparity. Because no sentence disparity existed until the decision in Martin, which was issued well after Robtoy's conviction, the state argues that Robtoy did not face the dilemma of the defendant in Jackson. Robtoy was never aware that he could avoid the death penalty or life without parole by pleading guilty and did, in fact, receive a
jury trial after pleading not guilty. Respondent's Memo at 8-9.

In response, Robtoy contends that defendants automatically have standing to raise a Jackson claim if they exercised their constitutional right to a jury trial and received a greater penalty than allowable after a guilty plea. Petitioner's Response to Respondent's Cross Motion for Summary Judgment, December 10, 1984 ["Petitioner's Response"] at 1-2. Robtoy bases this contention on the Ninth Circuit's decision in Parker, supra.

In Parker, and later in Sims v. Eyman, 405 F.2d 439 (9th Cir. 1969), the Ninth Circuit adopted the reasoning of the Sixth Circuit in Robinson, supra, which concluded that only three classes of defendants could have standing under Jackson: (1) defendants who pled guilty; (2) defendants who waived their right to a jury trial; and (3) defendants who demanded a jury trial and received the death sentence. Parker, 400 F.2d at 252, citing Robinson, 394 F.2d at 824; Sims, 405 F.2d at 445 n.3. In Parker, defendant had been convicted of aggravated bank robbery under 18 U.S.C. § 2113(e), which provided that a sentence of death could be imposed only by a jury. The court held that the defendant lacked standing because he himself did not fall into any of the three categories: he pled not guilty, went to trial, and did not receive a death sentence. 400 F.2d at 252. In Robinson, the Sixth Circuit reached the same holding as to a defendant charged and convicted under the Federal Kidnapping Act. 394 F.2d at 824. Sims concerned a defendant who received a trial by jury and the death sentence under Arizona law. In holding that the Arizona scheme did not violate the Jackson principle, the court noted that the defendant lacked standing because he "was not in fact deterred from exercising his Fifth and Sixth Amendment rights, and suffered no prejudice by receiving the death penalty since either a judge or a jury could impose the death penalty." Sims, 405 F.2d at 446 n. 3.

Applying the Parker test for standing in this case, it is readily apparent that Robtoy does not fall in either one of the first two categories: he did not plead guilty nor did he waive a jury trial. The third category includes defendants who have exercised their right to a jury trial and have suffered thereby some prejudice as a result of the sentence imposed. Sims, 405 F.2d at 445-46 n.3.[1] The inclusion of this third group reflects the Jackson Court's concern with protecting against "needlessly penaliz[ing]" defendants who exercise their constitutional rights. Jackson, 390 U.S. at 583.

However, in each of the cases discussed above, the defendant was aware of the sentence disparity before entering a plea. In this case, Robtoy was not and could not have been aware of any disparity because it did not exist until the Washington Supreme Court held in Martin that defendants in Robtoy's situation had the right to plead guilty and thereby receive a sentence of life with the possibility of parole. The purpose of the holding in Jackson was to avoid chilling the exercise of an accused's constitutional right to a jury trial and to protect that right by not needlessly penalizing its exercise. Here, Robtoy had a jury trial. Furthermore, at the time of this trial, his entry of a guilty plea, if it had been permitted, would have resulted in a sentence of life without parole, which is precisely the sentence he has now. Consequently, his exercise of his right to trial was not chilled nor did he suffer any prejudice at the time. The court concludes that Robtoy has no standing under Jackson to contest his sentence.

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1. Under the Robinson and Parker formulation of the test, the third category of defendants with standing under Jackson is described as those defendants "who demanded a jury trial and are now under a sentence of death." Parker, 400 F.2d at 252; Robinson, 394 F.2d at 824. Robtoy is not now under a death penalty. But the death penalty need not be an option under the challenged sentencing procedure for a defendant to succeed in a Jackson claim. Sentencing schemes for traffic offenses and violations of animal leash laws have been scrutinized under Jackson. See, e.g., Ludwig v. Massachusetts, 427 U.S. 618, 627 n.4 (1976); Scharf v. United States, 606 F. Supp. 379,383 (E.D. Va. 1985); United States v. Porter, 513 F. Supp. 245 (M.D. Tenn. 1981). This court concludes that the true focus of the Parker court's concern in describing the third category was not the imposition of the death sentence per se, but rather the requirement that the defendant have suffered prejudice pursuant to the sentencing scheme under examination. The language in Sims, 405 F.2d at 446 n.3 concerning the fact that the defendant "suffered no prejudice by receiving the death penalty" supports this analysis.

III. DENIAL OF MOTION TO PLEAD GUILTY

Under the fourth ground of his petition, Robtoy argues that the Washington Supreme Court's refusal to allow him to alter his plea to guilty violated his right to due process. Petitioner's Memo at 8-9. He contends that the sequence of events in his case resulted in a denial of his right to make a voluntary and intelligent plea to the charge against him. In particular, he claims that he had a right, at the time of his plea, to be informed of the consequences, including the fact that a plea of guilty would result in a life sentence with parole, as opposed to the more severe penalty imposed upon him for exercising his right to a jury trial. Id. at 5. Robtoy asks this court to set aside his not guilty plea and to allow him the opportunity to plead guilty. In response, the state argues that Robtoy's fourth ground fails to raise a federal issue cognizable under 28 U.S.C. § 2254.

Robtoy bases his due process argument on Boykin v. Alabama, 395 U.S. 238 (1969). Relying on Boykin, he argues that a plea of guilty calls for a voluntary and intelligent waiver of the rights of a criminal defendant. Robtoy also cites Ninth Circuit cases for the proposition that defendants must be apprised, at the time they enter a plea, of the maximum and minimum consequences of that plea. Yellow Wolf v. Morris, 536 F.2d 813 (9th Cir. 1976); United States ex rel. Pebworth v. Conte, 489 F.2d 266 (9th Cir. 1974).

Although Robtoy correctly states the law concerning pleas, he ignores the major difference between his situation and those of the defendants in Boykin, supra; Pebworth, supra; and Yellow Wolf, supra. In those cases the defendants pled guilty and thereby waived their privilege against self-incrimination, the right to a jury trial, and the right to confront their accusers. See, e.g., Boykin, 395 U.S. at 243. The purpose of the voluntary and intelligent standard for pleas is to protect the defendant from being coerced into giving up these rights. See United States v. Goodheim, 651 F.2d 1294, 1298-99 (9th Cir. 1981). Although Robtoy may have been misinformed by his counsel and the court as to the consequences of a guilty plea, he did have a plea of not guilty entered for him. Consequently, each of the rights waived in Boykin, was in fact freely exercised by Robtoy.

The Supreme Court has long recognized that there is no federally guaranteed right to plead guilty. North Carolina v.

Alford, 400 U.S. 25 (1970); Robtoy, 98 Wn.2d at 45 (a plea of not guilty maintains all of the defendant's rights). Robtoy invokes the sentencing disparity created by Martin subsequent to his conviction to demonstrate that his plea was neither intelligent nor voluntary. However, the Supreme Court has held that even a voluntarily and intelligently made guilty plea waiving a defendant's rights, when based on the then applicable law, does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. Brady v. United States, 397 U.S. 742, 756-58 (1970). In Brady, the defendant pled guilty under the Federal Kidnapping Statute's sentencing scheme, years before the Supreme Court held the scheme unconstitutional in Jackson. The Court found that Brady's plea was based on the law at the time and on his lawyer's advice, and that the Jackson decision did not make that plea an involuntary one. The fact that no one could anticipate Jackson did not alter the reliability or truth of the guilty plea. Id.

Putting aside the fact that, in Brady, the Supreme Court was concerned with whether Brady's waiver of his right to plead not guilty was voluntary and intelligent, then Brady seems directly on point. No one could have informed Robtoy that one year after his conviction and sentencing, Martin would create a sentence disparity.

Robtoy seeks to distinguish Brady by pointing out that he, unlike Brady, pled not guilty and that his plea was involuntary. Petitioner's Response at 4. At most, Robtoy can claim that his decision not to plead guilty and to stand mute as the court entered a not guilty plea on his behalf was based on misinformation given him by his own lawyers. He lost the opportunity to plead guilty, but no federally guaranteed right was violated. The voluntary and intelligent standard is meant to protect those who plead guilty, and thereby waive their trial rights. Since Robtoy had a plea of not guilty entered for him, he was able to exercise his fundamental constitutional rights. Robtoy, 98 Wn.2d at 45.

Robtoy has failed to demonstrate that the state's refusal to allow him to change from a not guilty to a guilty plea deprived him of a federally guaranteed right to due process. Consequently, he has failed to raise a federal issue and this court cannot grant Robtoy's habeas petition on due process grounds.

IV. CONCLUSION

For the reasons stated above, Robtoy's petition for habeas corpus pursuant to 28 U.S.C. § 2254 is DENIED.

The Clerk of the Court is directed to forward copies of this Order to petitioner Robtoy and to counsel of record.

DATED at Seattle, Washington this 16th day of January, 1986.

BARBARA J. ROTHSTEIN
United States District Judge

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

NO. C85-975T

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE

NEDLEY G. NORMAN, JR.,

Petitioner,

v.

KENNETH DUCHARME,

Respondent.

This matter has been referred to United States Magistrate Franklin D. Burgess pursuant to 28 U.S.C. § 636(b)(l)(B) and local Magistrates Rule MR4.

The petitioner in this matter was convicted of First Degree Aggravated Murder in Pierce County Superior Court on October 4, 1978, and was sentenced to death. Upon appeal to the Washington Supreme Court, the death penalty (as applied to the petitioner) was held to be unconstitutional, State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1982), and the plaintiff's sentence was modified to life in prison without possibility of parole. The petitioner is now incarcerated at the Washington State Reformatory at Monroe, Washington, and challenges both his conviction and his sentence on various constitutional grounds in this petition for federal habeas relief pursuant to 28 U.S.C. § 2254.

A short review of the facts underlying the petitioner's conviction is useful in putting these issues in perspective:

> Shortly before 11 p.m. on April 19, 1978, Nedley Norman, Kenneth Stemkoski, and Steven Richards were towing a car which they intended to abandon in the Illahee area of rural Kitsap

> County. They were stopped on Illahee Road by Deputy Dennis Allred for equipment violations. Allred was unaware that the car being towed was stolen. Moments later, Deputy Allred was left lying on the road, dead from multiple gunshot wounds. The following morning Stemkoski surrendered himself to the police. Richards was arrested at his attorney's office that same morning.
>
> Based on Stemkoski's statement that Norman was the trigger-man, an information was filed charging Norman with murder and a warrant was issued for his arrest. Shortly after Norman was taken into custody, he made a written confession wherein he admitted shooting Deputy Allred.

State v. Norman, No. 6151-I-II at 102 (W.D.Wa. January 14, 1983). The petitioner does not dispute any of the above. It should be noted, in addition, that the petitioner was not taken into custody until after the Information was filed.

"State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution." Townsend v. Sain, 372 U.S. 293, 312, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); Bashor v. Risley, 730 F.2d 1228, 1232 (9th Cir.), cert. denied, ____ U.S. ____, 105 S.Ct. 137, 83 L.Ed.2d 77 (1984); Miller v. Stagner, 757 F.2d 988, 992, opin. amended, 768 F.2d 1090 (9th Cir. 1985).

The various constitutional issues raised by the petitioner concern (1) the admissibility of the petitioner's confession, and (2) the propriety of the petitioner's sentence.

I. Confession.

Norman argues that the admission of his confession violated his Sixth Amendment right to counsel, his Fifth Amendment right to counsel, and was admitted despite being involuntary (Due Process Clause).

Following transfer to Pierce County Superior Court from Kitsap County on pretrial publicity grounds, the trial court judge, the Honorable Thomas Sauriol, held a hearing on the admissibility of the petitioner's confession on June 12, 1978. At the conclusion of testimony, the court found that the defendant had been properly Mirandized both orally and via printed form. Moreover, the court

found that Norman had "signed that he read and understood the rights, and thereupon made a statement that was not made under any fear, threat, duress of any kind whatsoever." 3.5 (from Washington Criminal Rule 3.5) and Omnibus Hearings (hereinafter Hearings) V.1, P. 91.

Upon motion of the defense, the court reopened the 3.5 hearing the following day, June 13. Norman himself testified, as did psychiatrists for both the prosecution and defense. Both sides argued at length as to precisely what degree of persuasion, coercion or deception was used to cause the confession, and as to the defendant's mental state at the time of confession. Again, the court ruled that Norman "had the mental capacity to waive his rights and that he did knowingly, voluntarily, and intelligently waive his rights" without "any promises or threats [or] deception". V.1, P. 282. Judge Sauriol also ruled Norman did not actually request an attorney of the officers. V.1., P. 284. Thus, the court held the confession to be admissible. Hearings, V.1, P. 285.

A. Sixth Amendment.

Norman was arrested at his place of employment upon an arrest warrant issued following the filing of the Information charging him with First Degree Murder. He was advised of his Miranda rights several times, including orally upon arrest and in written and oral form upon arrival at the police station. Detective Dean interrogated the petitioner for two hours. Dean apparently conducted the interrogation; this interrogation was not recorded. Detective Berg acted as an observer during much of the two hour interrogation. As Norman made his statement, Dean typed a paraphrasal of Norman's words. Norman initialed each page as it was finished. The first page contained a waiver of rights form, which Norman signed. The respondents argue that the petitioner, in waiving his Fifth Amendment right to counsel, waived his Sixth Amendment right to counsel as well.

There is a fundamental difference between the Fifth and Sixth Amendment rights to counsel. Of course, the Fifth Amendment right derives from the right to avoid incriminating oneself, and thus applies in any custodial situation. Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966). The Sixth Amendment right is implicated, on the other hand, by "criminal prosecutions" in which the right attaches to "the accused". U. S. Const. Amendment VI.

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse position of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecution" to which alone the explicit guarantees of the Sixth Amendment are applicable.

Kirby v. Illinois, 406 U.S. 682, 688-89 (1972).

However, the Supreme Court has not yet elaborated upon the threshold requirements for Sixth Amendment waiver of counsel.

In Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 423 (1977), the Supreme Court dealt with waiver in the context of a §2254 habeas corpus petition. The Sixth Amendment right to counsel had been raised as grounds for habeas corpus; the State claimed that the "totality-of-circumstances" indicated waiver of the right. The Court stated "that it was incumbent upon the state to prove 'an intentional relinquishment or abandonment of a known right or privilege.'" Brewer, 430 U.S. at 404 (quoting Johnson v. Zerbst, 304 U.S. 458, 464). The Court agreed that the state had not carried its burden and affirmed the issuance of a writ of habeas corpus.

The lack of specific guidance by the high court has resulted in differing treatment of Sixth Amendment waiver in the several circuits. The Ninth Circuit, in United States v. Karr, 742 F.2d 493 (9th Cir. 1984), summarized the positions of the other Circuits. As the Karr summary remains an admirable treatment, this Magistrate will quote from that opinion at length:
waive the Sixth Amendment right.

> The standard for waiver of the Fifth and Sixth Amendment rights to counsel is the same: the waiver must be (1) voluntary, and (2) a knowing and intelligent relinquishment of a known right or privilege. Edward v. Arizona, 451 U.S. 477, 482, 101 S.Ct. 1880, 1883, 68 L.Ed.2d 378 (1981) (Fifth Amendment); Brewer v. Williams, 430 U.S. at 404, 97 S.Ct. at 1242 (Sixth Amendment). Courts have split, however, regard-

ing what warnings are required before an indicted defendant can knowingly and intelligently The Second Circuit takes the strictest view. It has held that waiver of the right to counsel before trial requires "a clear and explicit explanation of the Sixth Amendment rights defendant is giving up." United States v. Mohabir, 624 F.2d 1140, 1150 (2d Cir. 1980). Miranda warnings alone are insufficient. Further, it has held that the rights must be explained by a neutral judicial officer, not by the prosecutor or agent seeking the waiver. Id. at 1153. The officer must show the indictment to the defendant, explain its significance, and highlight the seriousness of the defendant's position. Id. See also United States v. Brown, 699 F.2d 585, 588-89 (2d Cir. 1982).

No other circuit has adopted this standard. The Fifth and Sixth Circuits have found informed waivers where the defendant has received Miranda warnings and has indicated a willingness to talk. Jordon v. Watkins, 681 F.2d 1067, 1975 (5th Cir. 1982); United States v. Brown, 569 F.2d 236, 238-39 (5th Cir. 1978) (en banc); United States v. Woods, 613 F.2d 629, 634 (6th Cir.), cert. denied, 446 U.S. 920, 100 S.Ct. 1856, 64 L.Ed.2d 275 (1980).

The Seventh Circuit has endorsed a case-by-case approach. Robinson v. Percy, 738 F.2d 214 at 222 (7th Cir. 1984). It has found waiver where the defendant received Miranda warnings and the surrounding circumstances show that he understood his right to counsel. Id.

Other circuits have adopted intermediate positions. See United States v. Payton, 615 F.2d 922, 924-25 (lst Cir.) (valid waiver where defendant was given Miranda warnings and was informed of indictment), cert. denied, 446 U.S. 969, 100 S.Ct. 2950, 64 L.Ed.2d 830 (1980); United States v. Clements, 714 F.2d 1030, 1036 (4th Cir. 1983) (waiver requires knowledge of indictment), vacated by an equally divided court, 728 F.2d 654 (4th Cir. 1984) (en banc); Fields v. Wyrick, 706 F.2d 879, 881-82 (8th Cir.) (waiver where defendant was given Miranda warnings had previously invoked right to counsel, and had opportunity to consult counsel during interrogation),

> cert. denied, ____ U.S. ____, 104 S.Ct. 556, 78 L.Ed.2d 728 (1983).The only Ninth Circuit cases on point indicate that Miranda warnings suffice for waiver of the Sixth Amendment right. United States v. Mandley, 50 F.2d 1103, 1104 (9th Cir. 1974); Coughlan v. United States, 391 F.2d 371, 372 (9th Cir.), cert. denied, 393 U.S. 870, 89 S.Ct. 159, 21 L.Ed.2d 139 (1968). While these cases were decided before the Supreme Court's recent revival of Sixth Amendment analysis, their reasoning remains sound. A defendant who has been adequately informed of his right to counsel and of the fact that formal judicial proceedings have begun against him may validly waive his Sixth Amendment right to counsel. Karr validly waived his right here.

742 F.2d at 495-96.

Given the Ninth Circuit's citation to Mandley and Coughlan, it could be argued that the Ninth Circuit intended to adopt the position of the Fifth and Sixth Circuits, that a defendant may validly waive his Sixth Amendment right to counsel upon being Mirandized. Moreover, it does not technically follow from the Court's statement ("who has been adequately informed of his right to counsel and of the fact that formal judicial proceedings have begun") that the accused who has not been informed of the initiation of proceedings cannot waive his Sixth Amendment right to counsel.

However, this Magistrate believes that the petitioner's arguments are unrealistic in the context of police/suspect/ defendant contacts. When the petitioner was Mirandized, he was informed that he had a right to counsel. There has never been a requirement that an arrestee be expressly informed that this right to counsel was derived from the Fifth Amendment right of the defendant to remain free of compelled self-incrimination.

The Sixth Amendment states that an accused has a right to counsel. The petitioner, an accused man, was duly informed that he had a right to counsel.[1] This Magistrate would speculate

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1. Thus complying with the precise language of the Sixth Amendment. The fact that an individual has become an "accused", ie. formally charged, merely defines the commencement or the attachment of the right. As there exists no requirement under Miranda that a suspect be informed as to the legal conditions that trigger his Miranda rights (the formal state of being "in custody"), there should similarly be no requirement that an accused by informed as to the exact nature of the Sixth Amendment triggering event.

that more than one practicing attorney would be hard put to explain the precise differences between the Fifth Amendment and Sixth Amendment rights to counsel. To force the police into describing to an accused such a legal sophistry, or to mandate even more severe precautions (eg. warnings and explanations by impartial judicial officer) based upon the philosophical differences between one right and the next would defeat common sense.

This Magistrate thus reports that the wisest view of the Sixth Amendment right to counsel would be to find a valid waiver where the arrestee was given and then waived his Miranda rights (following the Fifth and Sixth Circuits). This Magistrate accordingly recommends that this court find no Sixth Amendment violation in this case.

B. Fifth Amendment.

The petitioner next argues that he made an express or equivocal request for counsel, thus invoking the protections outlined in Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1880 (1981):

> [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights [fn. omitted]. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id., at 484-85. While the petitioner was being transported to the police station in the police van, he asked Officer Henry (an acquaintance of the petitioner) "whether or not he should get an attorney." Henry told the petitioner that "that's a decision he would have to make, that I couldn't advise him one way or the other." Examination of Officer Henry, RPI 67. Officer Henry, apparently after some pause, asked the petitioner "Why?" The petitioner characterizes Henry's inquiry as an initiation of further conversation about the crime. This characterization may be justified; Norman responded "that he would like to tell me but that it wouldn't come out, that he couldn't get it out." Id. at 67-68.

Norman contends first that his question to Officer Henry was sufficient to invoke the right to counsel. Alternatively, he argues that his question constituted an equivocal assertion of counsel, requiring the police to cease all questioning except that designed to clarify Norman's desire for counsel.

The Ninth Circuit has recently dealt with this issue in United States v. Fouche, 776 F.2d 1398 (9th Cir. 1985). The defendant in Fouche, following arrest and an administration of Miranda warnings, stated that "he might want to speak to a lawyer, and wanted to make a phone call." 776 F.2d at 1401. This was a case of first impression for the Ninth Circuit.

> The Supreme Court has not addressed what constitutes a valid assertion of the right to counsel. Miranda states that a suspect invokes his right to counsel when he "indicates in any manner" that he wishes to consult an attorney. 384 U.S. at 444-45, 86 S.Ct. at 1612. In Edwards, the Court refers to a right to counsel that has been "specifically invoked." Edwards v. Arizona, 451 U.S. 477 at 482, 101 S.Ct. 1880 at 1884, 68 L.Ed.2d 378 (1981). In Brewer v. Williams, 430 U.S. 387, 404-05, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977), the Court speaks of "clear[ ]expressions" of desire for the presence of counsel. No Ninth Circuit cases provide guidance.

Id. 776 F.2d at 1404. The Ninth Circuit, adopting the approach of the Fifth Circuit, held that Touche's statement that he "might want to talk to a lawyer" was an equivocal, rather than an express request for counsel. Id. at 1405. The Ninth Circuit agreed that "where a suspect makes an equivocal assertion of counsel, the police must cease all questioning, except that they may attempt to clarify the suspect's desire for counsel." Touche, 776 F.2d at 1404-05.

However, this Magistrate cannot construe Miranda, Edwards and Touche to mean that the words "counsel," "attorney" or "lawyer" have talismanic powers; that any mention of one of these words either invokes the right to counsel or mandates that the police cease all questioning except for questions designed to clarify the petitioner's desire for counsel. Miranda spoke of any indication "that [the suspect] wishes to consult with an attorney . . ." Miranda, 384 U.S. at 445 (emphasis added). Such a "wish" is an affirmative expression of the desire for an attorney. An assertion may be "equivocal," but it must nonetheless be reasonably

interpretable as an expression of a positive intent on the part of a suspect to invoke his right to counsel.

This Magistrate does not believe that the facts here present an equivocal assertion of the right to counsel. The petitioner had been arrested and was sitting in a police van awaiting transport to police headquarters. He was being accompanied by Officer Henry, "a family friend who had known Mr. Norman since he was ten or eleven years old." Petitioner's Brief in Support of Summary Judgment at 25. Officer Henry was not "interrogating" the petitioner. The petitioner evidently initiated the conversation by asking Henry's advice as to whether he should talk with an attorney. It is worth noting that the petitioner had previously retained an attorney to handle his divorce; he could well have been more specific in requesting counsel. Officer Henry told the petitioner that he "couldn't advise him one way or the other." RPI:67. The petitioner himself testified that he had asked no officer other than Officer Dean [2] for counsel. RPXI:170. And in response to direct questioning concerning his conversation with Officer Henry ("Q. And do you recall what you said to him?"), the petitioner responded: "He tried to hold a conversation with me. And I was just blurting out words." RPX:138.

This Magistrate must conclude on the above facts that the petitioner's question of Officer Henry did not amount to an ambiguous or equivocal assertion of counsel.

C. Voluntariness.

A confession is considered inadmissible where it is "involuntary." Blackburn v. Alabama, 361 U.S. 199, 207, 80 S.Ct. 274, 280, 4 L.Ed.2d 249 (1960). While the ultimate question of "voluntariness" is a legal one requiring independent consideration by a federal court, Miller v. Fenton, 106 S.Ct. 445, 450 (1985), subsidiary state-determined factual questions "such as whether a drug has the properties of a truth serum . . . or whether . . . the police engaged in . . . intimidation tactics" are entitled to a presumption of correctness. Id. at 451; 28 U.S.C. § 2254(d)(1986). Moreover,

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2. The petitioner testified that he told Officer Dean that he wanted counsel, and that Dean refused to let him talk to anyone else. RPX:139, RPX1:170. Officer Dean absolutely denied these assertions. RPI:252.

> [i]n certain circumstances we will recognize that a factual determination is implicit in the actions taken by a state court. When a state trial court holds a hearing on a motion to suppress evidence and rules on the motion, a federal district court may assume that the state court found the facts necessary to support the state court's decision, unless there is some indication that the state court applied an incorrect legal standard. [Townsend v. Sain, 372 U.S.] at 314-15; see Marshall v. Lonberger, 459 U.S. 422, 433-34 (1983); LaVallee v. Delle Rose, 410 U.S. 690, 694 (1973).

Knaubert v. Goldsmith, 791 F.2d 722, 727 (9th Cir. 1986), cert. denied 107 S.Ct. 228.

This Magistrate cannot, in the context of the §2254(d) presumption of correctness, accept the petitioner's characterization of his two hour interrogation as a "psychological siege." Petitioner's Brief in Support of Summary Judgment at 35.

The trial court found that the petitioner was read his Miranda rights several times, and that the petitioner understood those rights. The court found that the petitioner was not sweating abnormally or hyperventilating at the time of his arrest or questioning. The court found the petitioner to have the mental capacity to waive his rights, and waived them knowingly, voluntarily and intelligently .[3]The court found that no promises or threats were made to the petitioner, and no deception practiced upon him. Based upon these findings, the trial court held that the petitioner's confession was voluntary.[4]

In addition to the trial court's f8indings of subsidiary fact, the record also contains the testimony of two psychiatrists concerning the voluntariness of the petitioner's confession. Dr. Hollenbeck testified for the petitioner, but stopped short of testifying that the petitioner's confession was in fact involuntary. When

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3. That the petitioner received his Miranda rights, and evidently waived them, is "a circumstance quite relevant to a finding of voluntariness." Frazier v. Cupp, 394 U.S. 731, 739, 89 S.Ct. 1420, ___ L.Ed.2d ___ (1969).

4. The "presumption of correctness" will fail to attach only in a handful of cases. See 28 U.S.C. § 2254(d)(l)(8); Townsend v. Sain, 372 U.S. 293, 313, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). The petitioner's hearing under Washington's CrR 3.5 (establishing procedures in determining confession admissibility) appears to have none of the flaws enumerated in 28 U.S.C. § 2254(d).

asked whether the petitioner knew what he was signing when he signed the waiver of rights form, Dr. Hollenbeck stated "[t]hat he knew he was waiving his rights, but he didn't know the consequences of such action, the ultimate consequences." RPI:202. When asked to explain what he meant about not knowing the consequences, Dr. Hollenbeck replied, "I will try to answer that as best I can. With respect to the issue of judgment, it does not sound to me that a man who would be exercising good judgment would waive rights with the ultimate consequence being that he could be hung until dead." RPI:203. Dr. Hollenbeck stated that, in his opinion, the petitioner probably felt "panicky, depressed, confused" and that his ability to concentrate was "markedly reduced." RPI:204. Dr. Hollenbeck ultimately opined that "given Mr. Norman's state of mind, state of panic, I feel that he would have signed such a statement simply to get it over with and to get out of the painful situation he was in", and that he may have signed the statement to obtain "[r]elief from the feeling of panic that he'd been experiencing, overwhelming anxiety, the feeling of just simply wanting to get it over with. He didn't really care anymore." RPI:206. But when asked, "would his signing the statement to escape anxiety be one of a free act of his at the time?" Dr. Hollenbeck responded, "I can't answer that; I don't know." Dr. Hollenbeck elaborated: he considered the question of free will to be a "philosophical question," and simply restated his opinion that "it would seem that Mr. Norman's decision to sign the statement, whether or not he knew what the content of the statement was, was that he simply wanted to get it over; he didn't care." RPI:207.

Dr. Jay Ehly, also a psychiatrist, testified for the prosecution. When asked whether he believed that the petitioner was capable of freely choosing to confess, Dr. Ehly stated, based upon his interviews with the petitioner and the details of the interrogation as related by the petitioner, that "I could not establish that he did not understand what was taking place and that he did not act voluntarily and knowingly and intelligently." RPI:236. Upon cross examination, Dr. Ehly was asked to take into account the hyperventilation and heavy sweating the petitioner allegedly displayed during his arrest, interrogation and confession, in light of Dr. Hollenbeck's opinion that the petitioner was suffering from depressive neurosis. Dr. Ehly responded: "I would say sweating

and [sic] anxiety were appropriate emotional responses, and to some entent [sic] the symptoms of depression would be the same." Dr. Ehly further opined that while the petitioner was "strongly encouraged" to make a statement, he was nonetheless not coerced. RPI:245-46.

Considering the trial court's findings of subsidiary fact, the testimony of the petitioner, the police officers and Drs. Hollenbeck and Ehly, this Magistrate concludes that the petitioner's confession was indeed voluntary for the purposes of this review.[5]

II. Sentence.

The petitioner was sentenced to death in 1978 pursuant to Washington's Death Penalty Act, former RCW 10.94.010 et seq. This Act provided that where a defendant was charged with First Degree Murder, the prosecuting attorney had thirty days in which to file written notice of intention to seek the death penalty. RCW 10.94.010. If no such notice was filed within 30 days, the prosecutor could not seek the death penalty. Id. Such notice invoked the special sentencing proceedings in which the jury was asked a series of questions designed to determine the heinousness of the crime. When the answers uniformly indicated heinousness, the judge sentenced the defendant to death. RCW 10.94.020, 9A.32.040(1). It should further be noted that the legislature in enacting RCW 10.94 included a severability clause:

> If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

RCW 10.94.900.

The last statutory provision that is relevant to this analysis is former RCW 9A.32.047, which states that where a death sentence is commuted by the governor or where the death penalty is held to be unconstitutional by the U.S. or Washington

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5. It is not disputed that during questioning the police told the petitioner that his two co-defendants had made statements implicating him; in fact, only one of his co-defendants had done so. This Magistrate cannot agree that the fact that only one co-defendant had implicated him rather than both would have a substantial impact on the petitioner's decision to confess. See Frazier v. Cupp, supra, 394 U.S. at 739 (interrogators misrepresenting to the defendant that his co-defendant had already confessed held not grounds for finding defendant's confession involuntary).

Supreme Court, the sentence shall be life in prison without possibility of parole.

The maximum penalty for First Degree Murder (as opposed to Aggravated First Degree Murder) is life imprisonment, with the possibility of parole. RCW 9A.32.040. Thus, the statutory scheme at the time of Norman's conviction was such that, had the petitioner pleaded guilty at his arraignment[6], he would have been sentenced at most to life imprisonment with the possibility of parole.

The petitioner is no longer subject to the death penalty. He and a number of others challenged the constitutionality of their death sentences in the state Supreme Court in State v. Frampton, 95 Wn.2d 464, 627 P.2d 922 (1981). The nine justices wrote six opinions, effectively holding that (1) death by hanging is cruel and unusual, and (2) that to penalize those who exercise their rights to avoid self-incrimination and to be tried by jury by subjecting them to the possibility of the death penalty rather than the maximum of life in prison is unconstitutional. Three of the justices would have further held that to be subject to life imprisonment without the possibility of parole would also have violated the rights of those defendants who wished to exercise their right to jury trial and right to avoid self-incrimination.

The petitioner's death sentence was thus commuted through the action of RCW 9A.32.047 to life in prison without possibility of parole. He contends that even this sentence unconstitutionally penalizes his rights to jury trial and to be free of self incrimination.

The two leading U.S. Supreme Court cases in this area are United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20

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6. The Washington courts have held State may not prevent the entry of a guilty plea, because the State had conferred the right to plead guilty through CrR4.2(a) and RCW 10.40.060. State v. Martin, (4 Wn.2d 1, 4, 614 P.2d 164 (1980). The Martin court further held that because the RCW 10.94 special sentencing procedure contemplated asking questions of the trial jury; where there is no trial, as in a guilty plea, the special sentencing proceeding cannot be conducted and the death penalty therefore cannot be imposed.

Accordingly, under the sentencing scheme at issue in this case, where a defendant was charged with Murder I (even after the prosecutor had filed a notice of intent to seek the death penalty) he was allowed to plead guilty, and in escaping the impaneling of a jury, would escape the death penalty.

L.Ed.2d 138 (1968) and Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978).

Jackson dealt with the federal Kidnapping Act, 18 U.S.C. § 1201(a), which provides:

> Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnapped . . . and held for ransom . . . or otherwise . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend or (2) by imprisonment for any term of years or fort life, if the death penalty is not imposed.

Thus, under the statute the death penalty could only be imposed upon one who had not pleaded guilty and who had not waived his right to trial by jury.[7]

> The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty [footnote omitted] and to deter exercise of the Sixth Amendment right to demand a jury trial.
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> ...
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> Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnapping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right.

390 U.S. 581-583.

Admittedly, the Jackson court seemed most concerned with the "chilling" effect on those who would normally have exercised their right to be tried by jury, but who pleaded guilty so as to avoid the possibility of the death sentence. Id. It is for this reason that the respondent claims that the petitioner has no standing to challenge the statutory scheme: the petitioner did choose to be tried by jury, therefore his exercise of that right was clearly not "chilled." Nonetheless, the Jackson court was additionally concerned with the "needless [ ] penaliz[ation of] the assertion of a constitutional right." Id. at 583.

Thus, the petitioner has standing under Jackson to challenge his sentence. He exercised his right to a jury and

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7. It is worth noting, as acknowledged by the court, that the Act did not mandate that those convicted by jury (where the kidnaper was not released unharmed) receive the death penalty. The statute merely authorized death as well as a sentence of years or of life. 390 U.S. at 572.

incurred a sentence he otherwise could not have received. Parker v. United States, 400 F.2d 248, 252 (9th Cir. 1968). The respondent takes the position, however, that the petitioner could not have known of the disparity in the sentencing scheme, and thus was undeterred from invoking his right to jury trial. the respondent misses the point of Jackson and Parker. Jackson was not concerned merely with the "chilling" of the exercise of the right to go to jury trial; if such was the case, no one who actually exercised his right to trial would have standing to challenge the sentence, because they were plainly undeterred. Jackson and Parker expressly recognize a second concern, that of the unfair penalization (relatively greater sentences) resulting to those who invoke their rights. Furthermore, penalization is penalization, regardless of whether the petitioner knew beforehand of the risk of a greater sentence upon proceeding to jury trial.[8]

In the alternative, the respondent argues that the disparity between life imprisonment with possibility of parole and life imprisonment without possibility of parole is not so significant as to implicate the Jackson rule. The respondent relies largely on Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978). Corbitt dealt with a New Jersey statutory scheme in which homicides were classified either First or Second Degree. The jury, in returning a verdict, was to decide whether the murder was a first or second degree crime. Those convicted of First degree Murder were mandatorily sentenced by the judge to life imprisonment (the death penalty is not permitted in New Jersey). Those convicted of Second Degree Murder were sentenced to a term of imprisonment not exceeding 30 years. Under this scheme murder was not to be

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8. This Magistrate also cannot accept the respondent's contention that State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980), (decided after the petitioner's sentencing), created the sentencing disparity here at issue. It is quite inferable from RCW 10.40.060 and CrR4.2(a) that the petitioner has the right to plead guilty at arraignment, and under former RCW 10.94.010, it is at least arguable, even prior to Martin, that the prosecutor must seek to file a notice of intention to seek the death penalty after the arraignment. Moreover, because RCW 10.94.020(2) expressly states that the "same trial jury" should be reconvened in the special sentencing proceeding, the logical implication is that where a defendant pleaded guilty, and so was not tried by jury, no special sentencing proceeding could be made. Thus, were a defendant to plead guilty even after the prosecution filed his death notice, it could have been inferred that the death penalty could not be imposed.

tried by the court, and guilty pleas were not allowed. However, pleas of non vult or nolo contendere were allowed: "If such plea be accepted," the punishment "shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree." N. J. Stat. Ann. § 2A:113-3 (West 1969). The New Jersey trial courts had complete discretion to accept or reject these pleas (so long as a defendant did not maintain innocence or refuse to admit facts that established guilt).

Thus, the basis of Corbitt's argument (he pleaded not guilty and was convicted of Murder I) was that he was penalized in pleading not guilty; his argument was "that because defendants pleading non vult could be sentenced to a lesser term, the mandatory life sentence following a first degree murder verdict was an unconstitutional burden" upon his exercise of his rights to plead not guilty and to go to jury trial. 439 U.S. at 216.

The Supreme Court upheld the New Jersey sentencing scheme

> We agree with the New Jersey Supreme Court that there are substantial differences between this case and Jackson, and that Jackson does not require a reversal of Corbitt's conviction. The principal difference is that the pressures to forgo trial and to plead to the charge in this case are not what they were in Jackson. First, the death penalty, which is "unique in its severity and irrevocability,"[9] Gregg v. Georgia, 428 U.S. 153, 187 (1976), is not involved here. Although we need not agree with the New Jersey court that the Jackson rationale is limited to those cases where a plea avoids any possibility of the death penalty's being imposed, it is a material fact that under the New Jersey law the maximum penalty for murder is a life imprisonment, not death. Furthermore, in Jackson, any risk of suffering the maximum penalty could be avoided by pleading guilty. Here, although the punishment when a jury finds a defendant guilty of first-degree murder is life imprisonment, the risk of that punishment is not completely voided by pleading non vult because the judge accepting the plea has the authority to impose a life term. New Jersey does not reserve the maximum punishment for murder for those who insist on a jury trial.

9. It is clear that the Jackson analysis extends to more than death penalty cases. See, for example, Ludwig v. Massachusetts, 427 U.S. 618, 627 n. 4, 96 S.Ct. 2781, 49 L.Ed.2d 732 (1976) (Jackson analysis considered in a case concerning a $20 traffic fine).

439 U.S. at 217 (emphasis added).

It appears to this Magistrate that the most weighty factor in the Corbitt Court's consideration was the ultimate flexibility of the New Jersey statute. After all, any given defendant could well be sentenced to either life imprisonment or a term for years, regardless of the plea entered. The court equated the New Jersey scheme to constitutionally valid plea-bargain procedures:

> There is no difference of constitutional significance between Bordenkircher v. Hayes, 434 U.S. 357 (1978) and this case.
>
> * * *
>
> In Bordenkircher, the probability or certainty of leniency in return for a plea did not invalidate the mandatory penalty imposed after a jury trial. It should not do so here, where there was no assurance that a plea would be accepted if tendered and, if it had been, no assurance that a sentence less than life would be imposed. Those matters rested ultimately in the discretion of the judge, perhaps substantially influenced by the prosecutor and the plea-bargaining process permitted by New Jersey law. [Footnote omitted].
>
> Bordenkircher, like other cases here, unequivocally recognized the State's legitimate interest in encouraging the entry of guilty pleas and in facilitating plea bargaining, a process mutually beneficial to both the defendant and the State [footnote omitted]. In pursuit of this interest, New Jersey has provided that the judge may, but need not, accept pleas of non vult and that he may impose life or the specified term of years. This not only provides for discretion in the trial judge but also sets the limits within which plea bargaining on punishment may take place. 439 U.S. at 221-223. [10]

---

10. Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), is readily distinguishable from the case at hand. Bordenkircher is by its own terms confined to situations involving plea bargaining:

> To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, [citation omitted], and for an agent of the State to pursue a course of action whose objection is to penalize a person's reliance on his legal rights is "patently unconstitutional." [Here the Court cites to Jackson, supra, among others.] But in the "give-and-take" of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.

434 U.S. at 363. The instant case has nothing to do with a plea bargaining situation, but in fact represents a "unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right . . . ." Id. at 362.

The Washington statute at issue here reflects none of the flexibility of the New Jersey scheme, nor does it appear that the scheme is structured solely so as to "encourage" guilty pleas. These factors alone distinguish Corbitt from the instant case. As the Corbitt Court concluded:

> We are unconvinced that the New Jersey statutory pattern exerts such a powerful influence to coerce inaccurate plea non vult that it should be deemed constitutionally suspect. There is no suggestion here that Corbitt was not well counseled or that he misunderstood the choices that were placed before him. Here, as in Bordenkircher, the State did not trespass on the defendant's rights "so long as the accused [was] free to accept or reject" the choice presented to him by the State, 434 U.S. at 363, that is, to go to trial and face the risk of life imprisonment or to seek acceptance of a non vult plea and the imposition of the lesser penalty authorized by law.

439 U.S. at 225. On the contrary, as the notice of intention to seek the death penalty in this case evidently was filed independently of any plea negotiations, it may fairly be said that "'the accused'" was not "'free to accept or reject' the choice presented to him by the State . . . ." Id.

The only distinction that this Magistrate can see between this case and that presented in Jackson is that here the sentencing disparity in between life imprisonment with or without the possibility of parole, while in Jackson the disparity presented was sentencing to life imprisonment or to death. The respondent suggests that there is little distinction in life with and without the possibility of parole, too insignificant to be seen as "penalizing" one who exercises his right to jury trial.

However, an unrelated line of cases (dealing with "proportionality" of sentence) suggest that there is a major difference between a life sentence without the possibility of parole.

Stated in general terms, the Eighth Amendment Cruel and Unusual Punishment Clause has been held to forbid disproportionately severe sentences for comparatively "mild" crimes. Until recently, the dividing line between sentences that were proportionate and those that were disproportionate was between sentences of imprisonment and sentences of death.

See, for example, in Rummell v. Estelle, 445 U.S. 263. 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980), in which a defendant received a life sentence, under a recidivist statute, following the commission of his third non-violent felony. The court held that the life sentence was valid, and noted that constitutional disproportionality had been found only in a few prior death sentence cases.

However, in 1983 the Supreme Court altered its approach to the proportionality of sentencing. In Solem v. Helm, 463 U.S. 277 (1983), a defendant was sentenced to life in prison without possibility of parole under a South Dakota recidivist statute. The felony that triggered the recidivist statute concerned passing a $100 bad check. The court held that the sentence was disproportionate, and rejected the State's argument that Rummell was controlling:

> Helm's present sentence is life imprisonment without possibility of parole. [Footnote omitted.] Barring executive clemency, . . . Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in Rummell v. Estelle. Rummell was likely to have been eligible for parole within 12 years of his initial confinement [footnote omitted], a fact on which the court relied heavily. [Citation omitted]. Helm's sentence is the most severe punishment that the state could have imposed on any criminal for any crime. [Citation omitted]. Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

463 U.S. at 297.

Given the Supreme Court's view that a life term without the possibility of parole is "far more severe" than a life term with the possibility of parole, this Magistrate feels compelled to conclude that the statutory scheme at issue here is closer to Jackson than to Corbitt. It is therefore the opinion of this Magistrate that the petitioner has been unconstitutionally penalized for exercising his right to be tried by jury.

CONCLUSION

The district court need only grant an evidentiary hearing on a habeas corpus petition when "relevant facts are in dispute and the state court did not hold a fair evidentiary hearing . . . ." Lindner v. Wyrick, 644 F.2d 724, 729 (8th Cir.), cert. denied, 454 U.S.

872, 102 S.Ct. 345, 70 L.Ed.2d 178 (1981). This Magistrate does not believe than an evidentiary hearing is required on the Sixth Amendment right to counsel issue (despite the lack of an evidentiary hearing in the state court) because it is his considered view that the Sixth Amendment right to counsel may be properly waived through a valid waiver of Miranda rights. This Magistrate next concludes, upon reviewing the state court transcripts and the trial judge's findings on these issues that the petitioner effectively waived his Miranda rights and that his subsequent confession was made voluntarily. Accordingly, this Magistrate finds no Fifth or Fourteenth Amendment violations in the petitioner's conviction.

However, this Magistrate concludes that the petitioner's sentence to life imprisonment without possibility of parole unconstitutionally penalizes the exercise of his right to jury trial, under the rule set out in United States v. Jackson, supra, 390 U.S. 570 (1968). The appropriate relief for an unconstitutional sentence is to remand this matter to the state courts. If the petitioner is not resentenced within sixty days following remand, the district court should issue the writ of habeas corpus. See Helm v. Solem, 684 F.2d 522, 587 (8th Cir. 1982), aff'd 463 U.S. 277, 103 S.Ct. 3001, ___ L.Ed.2d (1983). It is so recommended.

DATED this 24th day of April, 1987.

_____

UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C85-975T

ORDER

NEDLEY G. NORMAN, JR.

Petitioner,

-vs-

KENNETH DUCHARME,

Respondent.

THIS MATTER comes on before the above-entitled Court upon Petitioner's Petition for Writ of Habeas Corpus, and Respondent's Objections to Magistrate's Report and Recommendation.

Having considered the entirety of the records and file herein, it is now

ORDERED that the Report and Recommendation of the Magistrate herein, is hereby rejected and denied; and it is further

ORDERED that the Petition for Habeas Corpus is DENIED.

The clerk of the court is instructed to send uncertified copies of the Order to all counsel of record.

DATED This 23rd day of October 1987.

JACK E. TANNER
United States District Judge

APPENDIX E

CONSTITUTIONAL/STATUTORY PROVISIONS

Fifth Amendment to the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land o0r naval forces, or in the Militia, when actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment to the United States Constitution, section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C § 2254(a).

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Revised Code of Washington, 9A.32.030(1)(a). (1975)

(1) A person is guilty of murder in the first degree when:
(a) With a premeditated intent to cause the death of another person, he causes the death of such person or of a third person;

Revised Code of Washington, 9A.32.040(1), (2), (3). (1977)

Notwithstanding RCW 9A.32.030(2), any person convicted of the crime of murder in the first degree shall be sentenced as follows:
(1) If, pursuant to a special sentencing proceeding held under RCW 10.94.020, the jury finds that there are one or more aggravating circumstances and that there are not sufficient mitigating circumstances to merit leniency, and makes an affirmative finding on both of the special questions submitted to the jury pursuant to RCW 10.94.020(10),the sentence shall be death;
(2) If, pursuant to a special sentencing proceeding held under RCW 10.94.020, the jury finds that there are one or more aggravating circumstances but fails to find that there are not sufficient mitigating circumstances to merit leniency, or the jury answers in the negative either of the special questions submitted pursuant to RCW 10.94.020(10), the sentence shall be life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this subsection shall not have that sentence suspended, deferred, or commuted by any judicial officer, and the board of prison terms and paroles shall never parole a prisoner nor reduce the period of confinement. The convicted person shall not be released as a result of any type of good time calculation nor shall the department of social and health services permit the convicted person to participate in any temporary release or furlough program; and

(3) In all other convictions for first degree murder, the sentence shall be life imprisonment.

Revised Code of Washington 9A.32.047. (1977)

In the event that the Governor commutes a death sentence or in the event that the death penalty is held to be unconstitutional by the United States supreme court or the supreme court of the state of Washington the penalty under RCW 9A.32.046 shall be imprisonment in the state penitentiary for life without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer, and the board of prison terms and paroles shall never parole a prisoner nor reduce the period of confinement. The convicted person shall not be released as a result of any type of good time calculation nor shall the department of social and health services permit the convicted person to participate in any temporary release or furlough program.

Revised Code of Washington 9A.32.900. (1975-76)

If any provision of RCW 9A.32.045 through 9A.32.047, or its application to any person or circumstance is held invalid, the remainder of RCW 9A.32.045 through 9A.32.047, or the application of the provision to other persons or circumstances is not affected.

Revised Code of Washington 10.94.010. (1977)

When a defendant is charged with the crime of murder in the first degree as defined in RCW 9A.32.030(1)(a), the prosecuting attorney or the prosecuting attorney's designee shall file a written notice of intention to request a proceeding to determine whether or not the death penalty should be imposed when the prosecution has reason to believe that one or more aggravating circumstances, as set forth in RCW 9A.32.045 as now or hereafter amended, was present and the prosecution intends to prove the presence of such circumstance or circumstances in a special sentencing proceeding under RCW 10.94.020.

The notice of intention to request the death penalty must be served on the defendant or the defendant's attorney and filed with the court within thirty days of the defendant's arraignment in superior court on the charge of murder in the first degree under RCW 9A.32.030(1)(a). The notice shall specify the aggravating circumstance or circumstances upon which the prosecuting attorney bases the request for the death penalty. The court may, within the thirty day period upon good cause being shown, extend the period for the service and filing of notice.

If the prosecution does not serve and file written notice of intent to request the death penalty within the specified time the prosecuting attorney may not request the death penalty.

Revised Code of Washington 10.94.020. (1977)

(1) If notice of intention to request the death penalty has been served and filed by the prosecution in accordance with RCW 10.94.010, then a special sentencing proceeding shall be held in the event the defendant is found guilty of murder in the first degree under RCW 9A.32.030(1)(a).

(2) If the prosecution has filed a request for the death penalty in accordance with RCW 10.94.010, and the trial jury returns a verdict of murder in the first degree under RCW 9A.32.030(1)(a), then, at such time as the verdict is returned, the trial judge shall reconvene the same trial jury to determine in a separate special sentencing proceeding whether there are one or more aggravating circumstances and whether there are mitigating circumstances sufficient to merit leniency, as provided in RCW 9A.32.045 as now or hereafter amended, and to answer special questions pursuant to subsection (10) of this section. The special sentencing proceeding shall be held as soon as possible following the return of the jury verdict.

(3) At the commencement of the special sentencing proceeding the judge shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its findings as provided in RCW 9A.32.040 as now or hereafter amended.

(4) In the special sentencing proceeding, evidence may be presented relating to the presence of any aggravating or miti-

gating circumstances as enumerated in RCW 9A.32.045 as now or hereafter amended. Evidence of aggravating circumstances shall be limited to evidence relevant to those aggravating circumstances specified in the notice required by RCW 10.94.010.

(5) Any relevant evidence which the court deems to have probative value may be received regardless of its admissibility under usual rules of evidence: **Provided**, That the defendant is accorded a fair opportunity to rebut any hearsay statements: **Provided further**, That evidence secured in violation of the Constitutions of the United States or the state of Washington shall not be admissible.

(6) Upon the conclusion of the evidence, the judge shall give the jury appropriate instructions and the prosecution and the defendant or defendant's counsel shall be permitted to present argument. The prosecution shall open and conclude the argument to the jury.

(7) The jury shall then retire to deliberate. Upon reaching a decision, the jury shall specify each aggravating circumstance that it unanimously determines to have been established beyond a ~~reasonable doubt. In the~~ event the jury finds no aggravating circumstances the defendant shall be sentenced pursuant to RCW 9A.32.040(3) as now or hereafter amended.

(8) If the jury finds there are one or more aggravating circumstances it must then decide whether it is also unanimously convinced beyond a reasonable doubt there are not sufficient mitigating circumstances to merit leniency. If the jury makes such a finding, it shall proceed to answer the special questions submitted pursuant to subsection (10) of this section.

(9) If the jury finds there are one or more aggravating circumstances but fails to be convinced beyond a reasonable doubt there are not sufficient mitigating circumstances to merit leniency the defendant shall be sentenced pursuant to RCW 9A.32.040(2) as now or hereafter amended.

(10) If the jury finds that there are one or more aggravating circumstances and is unanimously convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency, the jury shall answer the following questions:
(a) Did the evidence presented at trial establish the guilt of the defendant with clear certainty?
(b) Are you convinced beyond a reasonable doubt that there is a

probability that the defendant would commit additional criminal acts of violence that would constitute a continuing threat to society?

The state shall have the burden of proving each question and the court shall instruct the jury that it may not answer either question in the affirmative unless it agrees unanimously.

If the jury answers both questions in the affirmative, the defendant shall be sentenced pursuant to RCW 9A.32.040(1) as now or hereafter amended.

If the jury answers either question in the negative the defendant shall be sentenced pursuant to RCW 9A.32.040(2) as now or hereafter amended.

Revised Code of Washington 10.94.030(2), (6). (1977)

(2) The supreme court of Washington shall consider the punishment as well as any errors enumerated by way of appeal.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

Revised Code of Washington 10.94.900.(1977)

If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

ORIGINAL

NO. 89-527

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

LAWRENCE KINCHELOE,

Petitioner,

vs.

MICHAEL ROBTOY,

Respondent.

KENNETH DUCHARME,

Petitioner,

vs.

NEDLEY G. NORMAN, JR.,

Respondent.

RESPONDENT MICHAEL ROBTOY'S LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Michael Robtoy, pursuant to Rule 46.1 and 18 U.S.C. §3006A(d)(6), asks leave to file the attached Consolidated Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Respondent previously has been granted leave to

proceed in forma pauperis and present counsel, David B. Bukey, has served as respondent's appointed counsel pursuant to the Criminal Justice Act in the Ninth Circuit Court of Appeals since his appointment in June 1987.

DATED this 26th day of October, 1989.

BUKEY & BENTLEY

By: David B Bukey
David B. Bukey
Counsel of Record for
Michael Robtoy

NO. 89-527

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Respondent.

CONSOLIDATED BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

In their Statement of the Case petitioners make troublingly misleading statements about the treatment of respondents' case in the state and federal courts below. Petitioners imply that the Washington Supreme Court did not apply, on respondents' direct appeals, the Washington Supreme Court's earlier decision in State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980). Yet, as is shown below, in the appeals of respondents and five others sentenced to death, the Washington Supreme Court in fact directly applied the Martin decision in State v. Frampton, et al., 95 Wn.2d 469, 627 P.2d 922 (1981).[1]

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[1] In Frampton the major question in the direct appeal of respondents and others was the application to the defendants' sentences of United States v. Jackson, 390 U.S. 570 (1968), in light of the holding of State v. Martin. Although some of the Washington justices would have overruled Martin, not one suggested that Martin should not be applied in respondents' cases if it were not overruled, and not one suggested that Martin's application raised any issue of retroactivity:

> The five issues which the court accepted for argument are:
>
> 1. Whether the present statutory scheme for imposing the death penalty is unconstitutional in light of State v. Martin . . .
>
> 2. If so, may the state still seek and have imposed in cases of aggravated first degree murder, the punishment of life imprisonment without possibility of parole . . .

State v. Frampton, supra, 627 P.2d at 924 (opinion of Dolliver, J.). See also, 627 P.2d at 927 ("we reaffirm our holding in State v. Martin . . .").

> The problem is here because of this court's interpretation of the aggravated murder statute in State v. Martin . . . If the error of that interpretation is recognized, the statutes are not

Accordingly, petitioners' claim that "the Court of Appeals [in this case] . . . gave the decision in State v. Martin a retroactive effect" when "the Washington Supreme Court refused to apply the Martin decision . . . to respondents" (petition at 6, n.6) is false. The Washington Supreme Court not only applied Martin, but vacated the death sentences of respondents and others without any question of "retroactivity" being raised or discussed. The Washington Supreme Court specifically rejected the state's suggestion that Martin be overruled. Retroactivity has never been considered by any court which has considered respondents' claims.

Another overstatement is petitioners' assertion that in State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982), the Washington court refused to apply Martin retroactively to Mr. Robtoy's sentence. This also is incorrect. The decision in State v. Robtoy involved a claim by Robtoy, after defending fully at trial and losing, that he should have been permitted to plead guilty to obtain a lesser sentence. The Washington Supreme Court rejected this claim but did not do so on the basis of retroactivity

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invalid under United States v. Jackson . . .

627 P.2d at 938 (opinion of Rosellini, J.).

> I am compelled to agree . . . that the death penalty statute, as it now stands, is unconstitutional . . . State v. Martin . . . is correct . . .

627 P.2d at 944 (opinion of Stafford, J.). See finally, 627 P.2d at 949 (opinion of Dore, J.), (arguing with the result in Martin) and 627 P.2d at 952 (opinion of Dimmick, J.) (". . . Martin is stare decisis . . .").

considerations. Rather, the court ruled that Robtoy could not be permitted to "gamble" by going to trial only to seek to vacate his earlier not guilty plea after the fact. The Washington Supreme Court's entire treatment of the issue is as follows:

> We first note that there is no constitutional right to plead guilty to a criminal charge. United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). Beyond this, Robtoy can point to no case authority, statute, or court rule which gives him that right at this late date. The situation here is thus quite unlike the one in State v. Martin, 94 Wash.2d 1, 614 P.2d 164 (1989), where we found the right to plead guilty in CrR 4.2(a). A plea of not guilty maintains all of the rights of the defendant and places in issue all elements of the offense charged. State v. Riley, 63 Wash.2d 243, 244, 386 P.2d 628 (1963). Certainly, no defendant is entitled to gamble on submitting a case to a jury on the theory that he has entered a plea of not guilty and, then, after verdict, say that he was prejudiced by not having been given an opportunity to plead guilty.

653 P.2d at 293. The issue of Martin's retroactivity was neither addressed by the parties nor discussed by the Washington Supreme court.

Finally, the State of Washington's Petition overlooks the fact that it never has presented an argument to any court which has considered respondents' claims regarding the retroactivity of the Martin decision. The state's argument to the Court of Appeals in both Robtoy and Norman's cases below was twofold: that respondents lacked standing to assert a Jackson claim and that the Jackson claim should be denied on the merits. It lost on both issues.

The state's petition for certiorari thus offers to this Court an imprecise and disingenuous recitation of prior

proceedings which presents a distorted picture of the history and issues actually determined in this case.[2]

REASONS WHY THE PETITION SHOULD BE DENIED

1. This Case Affects Few People and Does Not Present Any Issue of Retroactive Application of State Created Rights

This case involves the review of sentences of a small number of individuals under a now repealed statute (see State's Petition at p. 8, n.9). It should have little or no precedential effect on death penalty cases and, contrary to the state's suggestion, does not present any issue involving the relationship between state and federal courts.

Contrary to petitioners' argument, State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980), did not establish a new constitutional principle; rather, it interpreted "existing law." The court interpreted a state criminal rule (Washington State Criminal Rule 4.2(a)) and two then existing statutes (repealed statute RCW 10.94.020 and RCW 9A.32.040(3); and 9.95.115), in holding that "under existing law, the maximum penalty on a plea of guilty to first degree murder is life imprisonment with a possibility of parole." State v. Martin, 614 P.2d at 165. (Emphasis supplied) The Court of Appeals' conclusion in respondents' appeals that "Martin, however, neither altered nor added to Washington's death penalty statute, but merely

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[2] The state's petition also incorrectly asserts that Robtoy "apparently was never charged" with a strangulation murder of a woman. (State's Petition at 7, n.7.) This is incorrect. Robtoy received a life sentence for that crime following a guilty plea. The sentence is to run consecutively.

interpreted it" was a correct statement of Washington state law. 871 F.2d at 1481.

Petitioners' statement that "[t]he decision as to whether a state court decision based on state law should be applied retroactively is a state, not federal question . . ." (Petition at 8) is true but irrelevant here. As shown, no retroactivity argument ever has been presented in these cases and no court has made a retroactivity decision. Moreover, the state's argument overlooks the very body of state law governing such issues, developed by the Washington Supreme Court. The Washington courts have held unequivocally that questions concerning the proper construction of Washington criminal statutes do not present issues of retroactivity. Petition of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980) (holding that the sentencing court has the power to correct an erroneous sentence at any time); Johnson v. Morris, 87 Wn.2d 922, 927-28, 557 P.2d 1299 (1976). In Johnson, the court held that, under Washington law:

> It is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it. In other words, there is no 'retroactive' effect of the court's construction of a statute, rather once the court has determined the meaning, that is what the statute has meant since its enactment.

557 P.2d 1304 (emphasis supplied). Cited with approval in State v. Pittman, 54 Wn. App. 58, 772 P.2d 516, 520 (1989) (emphasis in the Pittman opinion). Given this fundamental tenet of Washington law, the Court of Appeals in the present cases could only have

construed the now repealed Washington Statute as it ". . . has meant since its enactment." To have undertaken a retroactivity analysis would have been in derogation of the very principle of federalism which petitioner invokes.

Taking State v. Martin, State v. Frampton and State v. Robtoy together, it is clear that as a matter of Washington state law, the only possible sentence which Mr. Robtoy and Mr. Norman could have received upon a plea of guilty under the then existing death penalty statute would have been life with possibility of parole. Any other sentence would have been void in view of the Martin decision and, had respondents pled guilty, would have to have been later modified to a term of life with parole.

In short, for a variety of reasons the Court of Appeals' decision in this case cannot be construed as having "created" any new federal rights, retroactively applied or otherwise. In State v. Martin the Washington Supreme Court interpreted existing Washington statutes and concluded that Martin could not receive any sentence other than life with parole upon a guilty plea. In State v. Frampton that same court held that the disparity in the same statutory scheme violated the principles of United States v. Jackson and required that the death penalty provisions be struck down. The Court of Appeals merely applied settled federal constitutional principles (as it was obligated to do) to a seriously flawed statutory sentencing scheme, and held that, under Jackson, the most serious form of punishment (life without possibility of parole) was reserved

solely for those who proceeded to trial. See, Robtoy v. Kincheloe, 871 F.2d at 1480-1. As is next shown, that decision was correct.

2. The Court of Appeals' Decision Is Fully Consistent With This Court's Decision in Corbitt v. New Jersey, 439 U.S. 212 (1978).

In Corbitt v. New Jersey, 439 U.S. 212 (1978), this Court clarified the constitutional principles first articulated in United States v. Jackson, 390 U.S. 570 (1968). In Corbitt, the Court made clear the distinction between penalties for not guilty pleas which do violate the Constitution and those which do not. The distinction is this: It is unconstitutional under Jackson to "reserve the maximum punishment for murder for those who insist on a jury trial." Corbitt, 439 U.S. at 217.

The Court of Appeals in the present cases applied precisely this principle in holding unconstitutional the sentences at issue: because, and only because, Mr. Robtoy and Mr. Norman went to trial, they received a life sentence without possibility of parole. Had they pled guilty, they could have received at most life with possibility of parole after thirteen to twenty years (depending on the amount of earned "good time" credits). State v. Martin, supra; State v. Frampton, supra. The penalty of life without possibility of parole is "far more severe than [a] life sentence." Solem v. Helm, 463 U.S. 277, 297 (1983). Washington thus at the time of Mr. Robtoy's and Mr. Norman's trials did ". . . reserve the maximum punishment for those who insist[ed] on a jury trial," Corbitt at 217. The Court

of Appeals thus could not have been more precisely correct that the life without possibility of parole sentences were unconstitutional.

Petitioners attempt to claim that Corbitt compels a different result through a misguided effort to equate the New Jersey sentencing scheme (upheld in Corbitt) with the now repealed Washington scheme. The two schemes are fundamentally different. New Jersey did not reserve the greatest murder penalty only for those who went to trial: a defendant going to trial could receive a life sentence and a defendant who pled guilty could also receive the same life sentence. Under the old Washington system, a defendant pleading guilty to first degree murder could not receive a life without possibility of parole sentence, while a defendant going to trial could receive such a sentence.

The state's petition also overlooks the sharp and specifically stated difference between the provisions of the then existing Washington death penalty statute for life without possibility of parole sentences and other types of life sentences. Repealed RCW 9A.32.047 provided for a mandatory sentence of life without possibility of parole and included such specific admonitions as that a person ". . . shall not have that sentence suspended, deferred or commuted by any judicial officer, and the board of prisons terms and paroles, shall never parole a prisoner nor reduce the period of confinement." (Emphasis supplied.) The statute also provided that such person "shall not

be released as a result of any type of good time calculation, nor shall the Department of Social and Health Services permit the convicted person to participate in any temporary release or furlough program." (Emphasis supplied.) The Washington statute could not have been clearer in its delineation of the differences between a sentence of life with, versus life without, parole.

The Washington scheme thus flatly is not "analogous to the difference between the mandatory life sentence and judicial sentencing discretion in Corbitt." Petition at 13. The life sentence which a New Jersey defendant could get was the same type of life sentence, whether it resulted from trial or plea: that life sentence was "mandatory" after jury conviction but the same life sentence might be imposed by a judge on a guilty plea. As this court stated:

> Here, although the punishment when a jury finds a defendant guilty of first-degree murder is life imprisonment, the risk of that punishment is not completely avoided by pleading non vult because the judge accepting the plea has the authority to impose a life term.

Corbitt, 439 U.S. at 217. Under the Washington system, a trial could result in a penalty much more severe than possibly could have been imposed after a plea. Under the plain terms of Corbitt, this violates Jackson.

The Court of Appeals in this case had the benefit of Solem v. Helm, supra, a significant precedent from this Court which was not available to the Washington Supreme Court in Frampton, which petitioners totally ignore. The Washington Supreme Court acknowledged that Mr. Robtoy and Mr. Norman could

not have received a sentence of life without possibility of parole after a guilty plea; that court simply thought that the difference between life without any possibility of parole was not so much greater a penalty than life with parole eligibility as to invoke Jackson principles. See, State v. Frampton, 627 P.2d at 952-3. But in Solem, this Court made clear that there is a distinction of constitutional dimension between sentences of life without possibility of parole and life with parole eligibility after a term of years. As this Court stated:

> Helm's present parole is life imprisonment without possibility of parole. Barring executive clemency . . . Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in Rummell v. Estelle, [445 U.S. 263] (emphasis added).

463 U.S. at 297 (emphasis added).

In light of Solem, it is abundantly clear that Jackson, not Corbitt, controls this case. The Court of Appeals understood this, and thus relied on Jackson. This was correct and was fully consistent with the interpretation of Jackson contained in Corbitt.

3. The Court of Appeals Granted Respondents the Appropriate Remedy Mandated By a Correct Resolution of Settled Constitutional Principles.

Petitioners make a puzzling argument that the Court of Appeals allowed respondents to obtain a so called "double shot" at relief. Specifically, petitioners assert that the lower court created a ". . . fourth and impermissible category of individuals eligible for Jackson relief," namely, those defendants who plead

not guilty and demand a jury trial. (Petition at 11.) Stripped of the specious "double shot" catch phrase, this appears to be a rehash of petitioners' contention to the Court of Appeals that Robtoy and Norman lacked standing to assert their Jackson claims. If so, the Court of Appeals properly rejected that argument in a holding consistent with the many prior decisions of this and other courts.

In the twenty-one years since United States v. Jackson, courts have applied the rationale of that decision to a variety of situations in which a person, as did Norman and Robtoy, pleaded not guilty, demanded a jury trial and later obtained relief. Indeed, in Corbitt v. New Jersey, supra, this court considered on the merits an argument grounded in the Jackson analysis made by a person who, as here, had pleaded not guilty, demanded a jury trial and then raised a Jackson claim. This Court assumed the viability of Corbitt's Jackson claim, while denying it on the merits.

The Court of Appeals correctly concluded below that United States v. Jackson "is not limited to death penalty cases." 871 F.2d at 1481.[3] Sentencing schemes involving such widely differing situations as traffic offenses and animal leash laws

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[3] The Ninth Circuit had previously considered the constitutionality of a cost provision in an income statute under a Jackson analysis. See, United States v. Chavez, 627 F.2d 953, 955-7 (9th Cir. 1980), cert. denied, 450 U.S. 924 (1981).

have been scrutinized under Jackson by many courts for many years.[4]

If petitioners' standing arguments were meritorious none of the claims set forth in these cited decisions would ever have been considered on the merits by this or other courts. In the present case, respondents received exactly that relief to which they were entitled under the law which has developed since United States v. Jackson. To accept petitioner's self-styled "double shot" argument would be to case aside twenty-one years of settled law.

Finally, the state's "double shot" argument completely overlooks this Court's decision in Solem v. Helm, supra. As shown above, in Solem this court recognized the fundamental difference between sentences of life with possibility of parole and other types of life sentences. The Court of Appeals, in a decision which post-dated Solem, recognized the same distinction in Chatman v. Marquez, 754 F.2d 1531 (9th Cir.), cert. denied, 474 U.S. 841 (1985), when it considered the constitutionality of changes in the California sentencing law. In sustaining a new law, the Court of Appeals held that a prisoner is "substantially

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[4] See, Ludwig v. Massachusetts, 427 U.S. 618, 627 (1976) (upholding a two tier traffic system); Scarf v. United States, 606 F. Supp. 379, 383 (E.D. Va. 1985) (holding a forfeiture of collateral provision unconstitutional); United States v. Porter, 513 F. Supp. 245 (M.D. Tenn. 1981) (holding a collateral forfeiture law unconstitutional). See also, Commonwealth v. Bethea, 379 A.2d 102, 105 (Penn. 1977); In Re Lawallen, 152 Cal. Rptr. 528, 590 P.2d 383, 386 (Cal. S.Ct. 1979); see also, People v. C, 27 N.Y.2d 79, 261 N.E.2d 620 (N.Y. App. 1970); Veilleux v. Springer, 300 A.2d 620 (Vt. 1973); State v. Nichols, 247 N.W. 2nd 249 (Iowa 1979).

benefited" when his sentence is changed from one of life without possibility of parole to life with possibility of parole. 754 F.2d at 1536. Thus, the Court of Appeals' decisions below merely followed settled law from this court and elsewhere.

The Court of Appeals correctly concluded that Washington's former death penalty statute was unconstitutional when so viewed and that these respondents, Messrs' Norman and Robtoy, had standing to benefit from this unconstitutionally flawed and now repealed statute.

CONCLUSION

For the foregoing reasons, respondents Michael Robtoy and Nedley G. Norman, Jr. respectfully urge this court to deny the petition in this matter.

DATED this 24th day of October, 1989.

Respectfully submitted,

BUKEY & BENTLEY

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9.95.115. Parole of life term prisoners

The board of prison terms and paroles is hereby granted authority to parole any person sentenced to the penitentiary or the reformatory, under a mandatory life sentence, who has been continuously confined therein for a period of twenty consecutive years less earned good time: *Provided,* The superintendent of the penitentiary or the reformatory, as the case may be, certifies to the board of prison terms and paroles that such person's conduct and work have been meritorious, and based thereon, recommends parole for such person: *Provided,* That no such person shall be released under parole who is found to be a sexual psychopath under the provisions of and as defined by chapter 71.12 RCW.

Enacted by Laws 1951, ch. 238, § 1.

RULE 4.2 PLEAS

(a) Types. A defendant may plead not guilty, not guilty by reason of insanity or guilty.

(b) Multiple Offenses. Where the indictment or information charges two or more offenses in separate counts the defendant shall plead separately to each.

(c) Pleading Insanity. Written notice of an intent to rely on the insanity defense, and/or a claim of present incompetency to stand trial, must be filed at the time of arraignment or within 10 days thereafter, or at such later time as the court may for good cause permit. All procedures concerning the defense of insanity or the competence of the defendant to stand trial are governed by RCW 10.77.

(d) Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

(e) Agreements. If the defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney, both the defendant and the prosecuting attorney shall, before the plea is entered, file with the court their understanding of the defendant's criminal history, as defined in RCW 9.94A.030. The nature of the agreement and the reasons for the agreement shall be made a part of the record at the time the plea is entered. The validity of the agreement under RCW 9.94A.090 may be determined at the same hearing at which the plea is accepted.

(f) Withdrawal of Plea. The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court later determines under RCW 9.94A.090 that the agreement is not binding, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered.

(g) Written Statement. A written statement of the defendant in substantially the form set forth below shall be filed on a plea of guilty: